

DRAFT -- JULY 28, 1993

CONNECTIONS: LAWYERS AND THE COMMUNITY
Reform of the Legal Profession and Legal Education

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INTRODUCTION

As I began writing this book, I was on the verge of becoming the president of the American Bar Association, an organization which we proudly (and perhaps incorrectly) claim to be "the largest voluntary professional association in the world."¹ If that extravagant claim is not true, then we are at least the largest of the world's lawyer organizations but the claim of being a one-year president of the largest bar association did not justify the enormous time necessary to do this job. Some years ago, I asked Chesterfield Smith, a great president of the American Bar Association, why the ABA presidency was a task worth undertaking. His answer, delivered in his usual direct way, was, "Because people will listen to you." For Chesterfield Smith, the ABA Presidency was a "bully pulpit" and his presidency during the Watergate years was one of great substance and impact. I decided that the bully pulpit was worth the time and I started on this work to be certain I had something to say from that pulpit.

In August 1991, at the last ABA meeting before I became President, Vice President Dan Quayle appeared before the convention, ostensibly to propose changes in the civil justice system, but in reality to launch a political campaign based on

¹ The National Education Association, for instance, has not challenged the American Bar Association but it is much larger.

24 assaulting lawyers and the justice system. It was apparent that
25 this attack, based on a rather flimsy program, was nevertheless
26 well received, and the public applause for the Vice President's
27 attack on lawyers was a sure signal that reform of the legal system
28 had popular support. The Vice President's program did not
29 accomplish much, but was there another program? Of course, the
30 American Bar Association and others had proposals on court reform
31 and access to justice that were much more comprehensive than the
32 issues addressed by the Vice President's fifty proposals, but was
33 there a program to address the real causes of dissatisfaction with
34 lawyers?

35 I looked at a calendar already full of invitations for
36 trips, conferences and speeches. Many of these functions were of
37 great importance but, in all these comings and goings, I could see
38 neither any time for reflection, nor any way to deliver a coherent
39 message. The ABA pulpit is a movable one, much like that of the
40 circuit-riding courts of English history. Invitations often
41 suggest a topic or indicate the host organization's agenda.
42 Suddenly, I was expected to say something about "The American
43 Lawyer in the 21st Century," or make profound comments to a panel
44 on "the impaired lawyer."

45 Such an incredible travel schedule potentially isolates
46 an ABA president from reality and threatens transformation into a

figurehead wandering from meeting to meeting, bringing hollow "greetings from the 365,000 members of the ABA" and delivering antiseptic messages about the contributions of the organized bar. Such a transformation would be a pity. These times may not have the high drama of Watergate, which provided a stage for Chesterfield Smith, but the legal profession faces very real challenges. The public openly questions whether our profession has anything to profess.

I decided to work on this project during my year as ABA President in an attempt to gather my thoughts about where American lawyers are and where they ought to be going. My perspective is shaped by the education I received as President of the ABA and by a variety of earlier experiences: as a trial lawyer, legislator, and member of various state and bar association commissions. Some of the following material contemplates legal education, enhanced by lessons I learned as a law school teacher, past dean and former chair of the ABA Council on Legal Education and Admissions to the Bar, which supervises the accreditation of law schools. Some of this book addresses judges and the judicial system, through insights gained by appearing before judges, being threatened with contempt, representing them before judicial conduct agencies, prosecuting impeachment inquiries against them, lecturing to and being lectured by them. Most of all, this book is about lawyers. I draw from thirty years of law practice, most of it in trial and

71 appellate practice, with a large and unusually public-spirited
72 corporate law firm. I regard the legal profession with great
73 affection and respect; however, the expression of those sentiments
74 is not the purpose of this book. I tried to use the presidential
75 "pulpit" to address how lawyers might better serve the public and
76 regain the spirit of professionalism.

77 I hope the suggestions set forth in this book will spur
78 debate in the legal community. I am certain that debate will cause
79 me to rethink the ideas I advance here, but am just as certain that
80 all is not well in legal education or in the profession, and that
81 lawyers should not continue down the path we have been on for the
82 last several decades.

83 If I criticize the profession, I mean to do so as a
84 person who believes he was called to the bar. In this, I subscribe
85 to the sentiment of Oliver Wendell Holmes, who argued in an 1897
86 lecture that some views of the law should be "washed in cynical
87 acid," but assured his audience with words I readily espouse:

88 I take it for granted that no hearer of mine
89 will misinterpret what I have to say as the
90 language of cynicism . . . I trust that no
91 one will understand me to be speaking with
92 disrespect of the law, because I criticize it

93 so freely. I venerate the law, and especially
94 our system of law, as one of the vastest
95 products of the human mind . . . But one may
96 criticize even what one reveres. Law is the
97 business to which my life is devoted, and I
98 should show less than devotion if I did not do
99 what in me lies to improve it . . .²

100 ² Jerome Frank, Courts on Trial 3 (1949) (quoting an 1897
101 Holmes Lecture).

Chapter One

THE SPECIAL PLACE OF AMERICAN LAWYERS

What is the place of the American lawyer? If we listen to much of the public and private dialogue, we hear a great deal of contempt and derision for lawyers. When former Vice President Dan Quayle, a political figure not known for his oratorical skills, asked whether this country really needs 70% of the world's lawyers, his very question was applauded. He stated his own firm resolve about this issue: "Enough is enough," he proclaimed, without offering any program to deal with this supposed problem. When any civic club speaker needs a laugh line today, she often relies on a "lawyer joke" that is usually a retooled ethnic or racist joke.³

Despite the contrary evidence based on observations of politicians and civic club comedians, the American legal profession today is, in most respects, at a level never before achieved. Lawyers today are better educated,⁴ better compensated,⁵ and better

³ The vast majority of these lawyer jokes are mere reconstructions of past racial or ethnic jokes. We're all familiar with the presumably witty observation that the only difference between a dead opossum in the road and a dead lawyer in the road are the skid marks in front of the opossum. In an earlier version of the same banality, the person dead in the road was not an attorney, but a black man.

⁴ On February 12, 1973, the ABA House of Delegates approved and adopted the Standards and Rules of Procedure for Approval of Law Schools. ABA, Standards for Approval of Law Schools iii (1987). Standard 502(a) establishes that the educational requirement for admission as a law degree candidate is either a

bachelor's degree from an accredited institution, or successful completion of three-fourths of the work acceptable for a bachelor's degree at an accredited institution. Id. at S502.

Today, only 20 of the 176 ABA-approved law schools admit, as law degree candidates, persons with only three years of college. ABA, A Review of Legal Education in the United States 4-63 (1991). The rest require a bachelor's degree. Id.

⁵ A 1990 report by the ABA Young Lawyers indicated the following salaries:

1990 Lawyers' Income by Job Setting

	<u>Private</u>	<u>Corp.</u>	<u>Govt.</u>
Less than \$ 15,000	4%	0%	7%
\$ 15,000 - \$ 24,999	4%	1%	5%
\$ 25,000 - \$ 39,999	13%	8%	33%
\$ 40,000 - \$ 54,999	19%	15%	31%
\$ 55,000 - \$ 74,999	17%	26%	24%
\$ 75,000 - \$ 99,999	13%	15%	6%
\$100,000 - \$199,999	18%	32%	0%
\$200,000 or more	10%	4%	0%

ABA Young Lawyers Division, The State of the Legal Profession - 1990 [Pre-Publication Draft] 35 (1990).

Lawyers are not as well paid as media reports sometimes suggest. The report found that "59% of all lawyers and 57% of all lawyers in private practice" earn less than \$75,000. Id. at 35-6 (emphasis original). Thus, the reports of starting salaries at Wall Street firms in excess of \$80,000 may tend to distort the public's perception of lawyer salaries overall.

A recent magazine article reported a 1990 salary survey, reporting that in major firms in major cities, first year associates can expect to receive between \$50,000 and \$82,000, junior partners earn \$140,000 to \$260,000, and senior partners earn \$850,000 to \$1 million. Margaret Mannix et al., The U.S. News Salary Survey, U.S. News and World Report, September 17, 1990, at 81, 84.

Other data indicate that this survey presents a distorted picture, but if the article is comparatively correct for other professions, this \$50,000 entry salary can be measured against \$22,200 for accountants, \$30,000 for software developer, \$28,000 to

organized than ever before. Even if the United States does not have 70% of the world's lawyers as Vice President Quayle has been fond of saying,⁶ we do have a large number of law-trained citizens, most of whom have passed a bar exam and are engaged in law practice of some sort.

This extraordinary prosperity comes to a profession which

\$35,000 for engineers, \$40,000 for financial planners, and \$70,000 to \$100,000 for physicians.

In a dissenting opinion urging that Florida lawyers should be required to render pro bono services under a mandatory system, Florida Supreme Court Justice Gerald Kogan cited the prosperity of Florida lawyers:

Thus, this Court necessarily must examine how Florida lawyers are using the franchise they have been granted by this Court -- a franchise that, in the last analysis, belongs to the public. In recent editions of The Florida Bar News, which is an official publication of The Florida Bar, a survey of Florida lawyers disclosed that the median attorney salary in this state was approximately \$71,000, while most attorneys with more than fifteen years' experience earn in excess of \$100,000. Florida lawyers report \$71,000 average income, Fla. Bar News, Sept. 1, 1990, at 1, col. 1. Meanwhile, the 1990 per capita income for All Floridians was only \$18,586. U.S. Dep't of Commerce, 71 Survey of Current Business 33 (1991). This wide disparity in income shows not only how profitable the franchise to practice law can be; it also poignantly demonstrates that legal services lie beyond the means of most Floridians, who cannot afford to pay large retainers and steep hourly rates charged by many lawyers. ...

⁶ The United States has "somewhere between 25% and 35% of the world's lawyers, using that term to refer to all the jobs that American lawyers do..." Marc Galanter, address before the National Conference of Bar Presidents (February 1, 1992), in the Legal Times.

204 has played an important role in American society, a role commented
205 on by Alexis de Tocqueville in his classic early book, Democracy in
206 America:

207 Lawyers belong to the people by birth and
208 interest and to the aristocracy by habit and
209 taste; they may be looked upon as the
210 connecting link between the two great classes
211 of society.⁷

212 De Tocqueville, who observed America and authored his book in the
213 early 1830s, was trained as a lawyer and he was, by birth, a member
214 of the French aristocracy. His idea of an "aristocrat" was of a
215 person who followed a code of honor which recognized obligations to
216 others in the community.⁸ I question whether lawyers still provide
217 the "connecting link," but lawyers clearly do remain in a central
218 role. A modern scholar-statesman, non-lawyer, Senator Daniel
219 Patrick Moynihan, says in a recent book:

220 The prominence of lawyers in American public
221 life, if frequently noted, ought not on those

222 ⁷ Alexis de Tocqueville, Democracy in America (New York:
223 Vintage Books, 1990), p. 276.

224 ⁸ Andre' Jardin, Tocqueville (Farrar, Strauss and Girous,
225 1988) pp. 253, 254.

grounds to be ignored. It approaches a
national trait.⁹

From the beginning, lawyers have been active in the political life of the country where, as Thomas Paine observed, law had become the king:¹⁰ "thirty-three of the fifty-five participating members of the Constitutional Convention were lawyers,"¹¹ and lawyers still are prominent in public affairs. A majority of the U.S. Senate and about 40% of the House of Representatives are lawyers, lawyers play a large role in the executive branch, and the entire judicial branch above the Justice of Peace level is staffed by lawyers.

In legal systems known to much of the world, lawyers do not command so prominent a place and judges often are regarded as bureaucrats or functionaries. We are common lawyers, and the place of lawyers and judges is very distinct in the American U.S. system. In the civil law world, law school is in the undergraduate curriculum and neither law practice nor the judiciary commands such prominence or respect.

⁹ Daniel P. Moynihan, On the Law of Nations (Harvard University Press, 1990) p. 20.

¹⁰ Quoted by Paul D. Carrington, "Law and Chivalry: An Exhortation From the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1746-1816)," 53 U. of Pittsburgh L.R. 705, 740 (Spring, 1992).

¹¹ ABA Report of The Commission on Professionalism 1 (August, 1986).

Civil law judges are not selected from experienced lawyers and their careers trace a bureaucratic model, beginning a period of apprenticeship upon graduation from law school and gradually moving up in judicial ranks. In the civil law tradition, judges are not so important and do not have the creative role of common law judges, particularly those in the United States, who are granted the power of judicial review.¹²

The system which developed and spread the Napoleonic Code did not contemplate anything approaching our notions of judicial supremacy. Indeed, that system promoted a doctrine of judicial passivity. Judges were not free to overrule legislation and were

¹² As Professor John Henry Merryman explains:

But to us the common law means the law created and molded by the judges, and we still think (often quite inaccurately) of legislation as serving a kind of supplementary function. We are accustomed, in the common law world, to judicial review of administrative action, and in the United States the power of judges to hold legislation invalid if unconstitutional is accepted without serious question. We know that our judges exercise very broad interpretative powers, even where the applicable statute or administrative action is found to be legally valid. We do not like to use such dramatic phrases as "judicial supremacy," but when pushed to it we admit that this is a fair description of the common law system, particularly in the United States.

John H. Merryman, Civil Law Tradition (Sanford Univ. Press, 1985), p. 34.

not invited to interpret it.¹³ As Professor Merryman states, "in the civil law world, a judge is something entirely different. He is a civil servant, a functionary."¹⁴ Professor Merryman traces this concept of the judicial function in civil law countries to Roman times:

One of the principal reasons for the quite different status of the civil law judge is the existence of a different judicial tradition in the civil law, beginning in Roman times. The judge (**index**) of Rome was not a prominent man of the law. Prior to the Imperial period he was, in effect, a layman discharging an arbitral function by presiding over the settlement of disputes according to formulae supplied by another official, the **praetor**.¹⁵

The task of judges in the classic civil law system was to apply the law and the judicial function was seen as the mere

¹³ That role was assumed by law professors who were learned in codes and who played a creative role, not only in the drafting but in the interpretation of the civil codes.

¹⁴ Merryman, supra, note _____, at 35.

¹⁵ Id.

305 application of the legislative code. There were no reports of
306 judicial decisions, no reliance on judge-made law, no doctrine of
307 judicial review. The judicial role was neither dominant nor
308 creative.¹⁶

309 Even in England, there is no accepted doctrine for
310 judicial review of statutes, and the principles of parliamentary
311 sovereignty largely limit judges when they are considering
312 statutes. Once we have in our minds how these other systems work,
313 we understand that the doctrine of judicial supremacy and the
314 culture of the American justice system places our judges on a level
315 unknown in other societies.

316 The lawyer's role also is limited in civil law countries.
317 Institutions of the adversary system, treasured by common lawyers,
318 are not accepted as widely in the classic civil law system. Cross-
319 examination of witnesses and the jury system feature the common
320 lawyer as a central player in the drama with the jury acting as an
321 audience to assess the outcome. "Drama," "player," "audience" --
322 we often use the terms of theater to describe trials in the common
323 law system and dramatists frequently use trials for the setting of
324 their plays. Popular culture has drawn greatly on the stories of

325 ¹⁶ Id. at 36-8. I intend to generalize here. There are
326 many exceptions and trends may be bringing civil and common law
327 systems closer.

law and lawyers. Motion pictures ("To Kill a Mockingbird," "And Justice for All," "The Verdict"), television programs ("Perry Mason," "LA Law")¹⁷ and books (consider the incredible popularity of John Grisham's and Scott Turow's books) often draw on the drama of law for its themes or for a dramatic setting.¹⁸ Of course, this is in large part so because, as Judge Richard Posner has observed, the Anglo-American trial, like the ancient Greek trial, is "more of a private contest, a struggle, a drama, than an official inquiry."¹⁹

I believe this use of legal settings for popular literature and culture reflects more than just the inherently dramatic nature of Anglo-American trials. The literary focus on

¹⁷ The 1991 crop of television shows which deal with lawyers are interesting. One reviewer has observed that "The Trials of Rosie O'Neal" and "Equal Justice" often deal with disillusioned lawyers, lawyers who have left large firms for practice among the less rich and more distressed. Frank Lovece, "Bucking the Legal System," Newsday, March 10, 1991, at 11. They are unlike the "Perry Mason school of lawyers" who were "polite, brave, clean, reverent and trustworthy." Id. The new series depict lawyers who are "brash, bold, ruffled, irreverent and corner-cutters." Id. See also, Bob Wisehart, "Varied Characters Belly Up to the Bar as Lawyers on TV", Chicago Sun-Times, March 20, 1991, at ____.

¹⁸ Lawyer/author John Grisham's great success (A Time to Kill, The Firm, The Pelican Brief, The Client) has placed multiple books on the best selling list simultaneously. Scott Turow has had similar success with fictional works (Presumed Innocent, etc.).

¹⁹ Richard A. Posner, Law and Literature (Harvard, 1988), page 78, note 17. Posner writes: "It is no accident that English and American literature, but not that of the Continent, is full of trials and other legal incidents."

the law also reflects the important role that law plays in American society. We do not see trials as the setting for plays or as the subject of literature so often in the literature or popular culture of nations with civil law systems. Even Franz Kafka, a lawyer who published books with titles suggestive of legal themes, did not really write about the law, nor did he use trials as a central dramatic focus. No one argues that his treatment of law is a description of the civil law system, although he may have forecast the corruption of the civil law system when placed in the service of totalitarian governments.²⁰

The unique role of American lawyers was commented on recently by Justice Ben Overton of the Florida Supreme Court in an opinion dealing with the lawyer's pro bono obligation:

... It is extremely important for all to understand the unique and important role of the legal profession in this country in protecting individual rights. The role of lawyers in this country is very different from that of lawyers in most countries of the

²⁰ These observations are not meant to slight those authors from civil law jurisdictions who have written powerfully about legal subjects. I merely note that the high incidence of stories about lawyers and the frequent use of trials as a dramatic setting is a distinctive trait of British and American popular culture, not that of, say, France or Germany.

384 world. Our legal system is different because
385 we have a means to challenge the
386 constitutionality of government actions and
387 government conduct, as well as the conduct of
388 individuals and entities. There is no
389 constitution in Great Britain, and neither a
390 barrister nor a solicitor can challenge a
391 parliamentary act. The ability to challenge
392 government conduct in France is also limited,
393 and the means for an individual to challenge a
394 legislatively adopted act as unconstitutional
395 is nonexistent.²¹

396 My purpose is not to explore the original differences
397 between the civil law and common law system (for these differences
398 are being blurred today), but to justify the statement that lawyers
399 and judges are more central to the countries which have adopted the
400 common law system, particularly as it has been developed in the
401 United States.

402 Any attempt to assess the place of the American lawyer
403 must deal with American law as a powerful spiritual force in
404 American society. I am drawn to the scholars who have developed de

405 ²¹ In Re Amendments to Rules, 598 So.2d 41, 42 (1992).

Tocqueville's idea of law as the "civil religion" of this country, with the Constitution as the major text. Professor Sanford Levinson's book, Constitutional Faith,²² gathers together much of the thinking on this subject. He says:

Veneration of the Constitution has become a central, even if sometimes challenged, aspect of the American political tradition. Irving Kristol typifies this strand of our tradition, and its accompanying rhetoric... "The Flag, the Declaration, the Constitution - - these," according to Kristol, "constitute the holy trinity of what Tocqueville called the American 'civil religion.' These formal symbols -- and the historical experiences that they condense -- evoke, for some, what the late Alexander Bickel once termed "the secular religion of the American republic," in which "we find our visions of good and evil."²³

Professor Levinson cites Max Lerner for the idea that, "Every tribe clings to something which he believes to possess

²² Sanford Levinson, Constitutional Faith (Princeton Univ. Press, 1988).

²³ Id. at 11.

429 supernatural powers as an instrument for controlling unknown forces
430 in a hostile universe." Lerner draws out the thesis that the
431 American secular religion is built on the same base as other
432 religions:

433 In fact the very habits of mind begotten by an
434 authoritarian Bible and a religion of
435 submission to a higher power have been carried
436 over to an authoritarian Constitution and a
437 philosophy of submission to a higher law; and
438 a country like America, in which its earlier
439 tradition had prohibited a state church, ends
440 by getting a state church after all, although
441 in secular form.²⁴

442 Professor Levinson's concept of secular religion
443 conceives of the lawyer's proper role as one of not merely giving
444 advice about what the courts may decide, but more -- advice about
445 what spirit of the law should require.²⁵

446 This sense of the Constitution and laws as holy text is
447 powerful in accounts of the civil rights movement, itself flowing

448 ²⁴ Id. at 12.

449 ²⁵ Id. at 47.

450 from religious springs. In her book about the impact of the civil
451 rights movement in McIntosh County, Georgia, Praying for Sheetrock,
452 Melissa Faye Greene describes the reaction of a local black leader,
453 Alston Thurnell, to the civil rights lawyers:

454 And this Constitution of which they were
455 so fond, with which they felt so intimately
456 acquainted! Housed in distant Washington,
457 under glass, indecipherable script fading from
458 parchment, it spoke to the black people for
459 the black people, and would protect the black
460 people, according to the lawyers. The
461 Constitution, Thurnell was promised, had
462 something to say about the miserably low
463 status of his small community on the Georgia
464 coast. In similar soothing, promising tones,
465 Rev. Grovner told the sick and the angry that
466 God loved them, too. The Constitution, the
467 black men came to understand, was the white
468 boys' Bible; and the lawyers quoted it often,
469 chapter and verse, taking secular pleasure in
470 its ornate language every bit as much as the
471 rural people relished the antiquated resonance
472 of biblical thou shalts and wherefores and
473 comeths and goests. But was this religion, or

474 was this fact? Were they to trust the
475 lawyers?

476 ... Alston threw himself, his family, and
477 his community upon the law. He entered the
478 sanctuary of the law. The law spoke to him
479 ... of fundamental truths. The law echoed the
480 truth that he had carved from his own life:
481 Men were born equal and should be treated
482 equally.

483 ...

484 The law sounded God-given to him. He
485 opted to trust the white lawyers.²⁶

486 The importance of this civil religion is understood when
487 we realize how few principles are generally accepted by Americans,
488 how few ideas bring us together. Professor Levinson states this in
489 a compelling way when he says, "The Constitution thus becomes the
490 only principle of order, for there is no otherwise shared moral or
491 social vision that might bind together a nation."²⁷

492 ²⁶ Melissa F. Greene, Praying for Sheetrock 180 (Reading,
493 Mass: Addison-Wesley, 1991).

494 ²⁷ Levinson, supra, note _____ at 73.

495 I have pondered this passage, and though I am troubled by
496 the sweep of the claim, I find myself agreeing that constitutional
497 law and the idea of a just society based on law are very important
498 factors in bringing Americans together. I recognize that the law,
499 particularly constitutional law, can be a powerful cohesive force.

500 I also recognize that lawyers play a special role in
501 this. If the Constitution is the central text and law is the
502 secular religion, our analogy compels us to ask: Who are the
503 ministers, priests and bishops of this civil religion? Perhaps it
504 is the teachers, particularly public school teachers, who play the
505 role of the ministers by giving the larger public some vision of a
506 just society based on a constitution and a unique judicial system.

507 If lawyers are expected to play the role of priest in the
508 secular religion, then it is an expectation which is bound to be
509 disappointing, since legal issues have lawyers on each side. The
510 Constitution may provide us with important unifying principles but
511 the lawyers seem never to be in accord about these principles.
512 Lawyers are seen to be taking both sides and, with their advocacy,
513 undermining the legitimacy of opposing lawyers. It is though there
514 is a civil religion, a sacred text and an exposition of the text
515 which, on every question, presents two opposing views. There are
516 not many religious groups which address basic questions by offering

opposing views to the congregation.²⁸ Indeed, religious groups are formed by gathering those who have common beliefs and the faithful expect their ministers, priests and rabbis to adhere to those beliefs.

It does not help that lawyers are seen to be profiting from disputation. The secular religion may be accepted by most Americans and the goals of a just society may be generally regarded, but there is understandable skepticism when a special class of people is seen to reap rich benefit from a process so venerated.

The irony is that when Americans value justice most, they may most resent lawyers who seem to be making great profits from the administration of justice. Any political discussion of the tort system and possible reforms quickly leads to discussions of contingency fees, of the large percentage of any damage recovery which goes to the lawyers and of the large transaction costs involved in the tort system. Equally resented are enormous fees

²⁸ I can think of only one place where opposing views are institutionally promoted, and that is the use of the "Devil's Advocate," a spokesman to make the arguments against a candidate for sainthood. Of course, if we look on religion even one religion (say, Christianity) more broadly, we see the many contending versions of the true religion. My point is that though law may indeed be a powerful unifying theme in this country, lawyers are not effective preachers of the law gospel because they are thought to be motivated by a large measure of self-interest.

543 paid to corporate lawyers, and these fees are often seen as
544 payments which allow polluters to continue their destructive
545 practices or savings-and-loan executives to defraud both government
546 and investors. There is a sense that lawyers are not facilitators
547 of justice, but rather indecent middlemen, much like the corrupt
548 priests and bishops who sold indulgences in pre-Reformation times.

549 In these various conceptions we are still left with our
550 question: What is the proper role of lawyers?

551 The answer always will be confusing. Lawyers are both
552 the specially trained and ordained class which has sworn to uphold
553 justice and the agents for the unscrupulous who seek to escape from
554 justice. Lawyers are both the principled leaders of social change
555 and the defenders of privilege. The ambiguous role of lawyers in
556 our adversary system is difficult to explain and means that lawyers
557 who seek popularity for the legal profession are likely to be
558 disappointed. If lawyers are performing their roles defending
559 people accused of terrible crimes and challenging majorities in
560 their social arrangements, then they should not look for
561 popularity. If they fulfill their calling, they should at least
562 find satisfaction, yet (as we shall see in Chapter Two) evidence is
563 accumulating that lawyers are, increasingly, dissatisfied.

564 De Tocqueville told us that lawyers play the role of

565 "connecting" the great classes of society. Increasingly, lawyers
566 are not connected with society and, while still commanding a
567 special place, lawyers risk losing their role. Since the
568 institutions of American law are built so closely on public respect
569 for the courts and since the public perception of the courts is so
570 inevitably bound up with that of lawyers, the threat is greater
571 than to the individual lawyers or even the whole profession. The
572 erosion of respect for lawyers and the law threatens the belief
573 system in justice which has been of fundamental importance to the
574 civic life of this country since its founding.

575 The crisis in public confidence, the loss in our own
576 self-esteem, the agony in legal education, the setbacks to the
577 assumptions of the large law firms, makes this a time for us to
578 look in new directions and, perhaps, to remember some old
579 traditions as well.

Chapter Two

DISCONTENT ABOUT LAWYERS -- DISCONTENT AMONG LAWYERS

Despite the central role of law and lawyers in our society, and in part because of that role, there is considerable public discomfort about the legal profession. Concern with "professionalism," though hardly new, seems to be more widespread than ever within the profession. We need to look at the external attacks on lawyers and at the evidence of dissatisfaction within the profession.

Public Hostility to the Legal Profession

American lawyers have been the focus of political debate and public scorn since colonial days, when there were constitutional and statutory provisions aimed directly at restricting and even prohibiting the legal profession. Professor Lawrence Friedman reports:²⁹

The first years of the colonial experience were not friendly years for lawyers. Few of the earliest settlers were lawyers. In some colonies, no lawyers were welcome. In Massachusetts Bay, the Body of Liberties (1641) prohibited pleading for hire. The

²⁹ Lawrence M. Friedman, A History of American Law (Touchstone Book, Simon and Schuster, 1973), p. 81.

"attorneys" of early Virginia records were not trained lawyers, but attorneys-in-fact, laymen helping their friends in court. In 1645, Virginia excluded lawyers from its courts; Connecticut also prohibited them. The Fundamental Constitutions of the Carolinas (1669) was equally hostile; the draftsmen felt it was "a base and vile thing to plead for money or reward."

The historian Daniel Boorstein has noted that, "The ancient English prejudice against lawyers secured new strength in America."³⁰

Today's hostility is expressed in loose political rhetoric (much of it recently from the top of the federal executive branch), and in the derision that often comes in the form of lawyer jokes.³¹

When Vice President Quayle appeared at the August 1991 meeting of the American Bar Association and attacked lawyers, he

³⁰ Daniel Boorstein, The Americans, the Colonial Experience (Vintage Books, 1950) p. 197.

³¹ Lawyer jokes are now frequently collected and published. See, e.g., Michael Rafferty, Skid Marks (Skelter Publications, Bolinas, Calif., 1988).

626 did so with a stated purpose of introducing a bold program of
627 reform through a group of fifty proposals to change the civil
628 justice system.

629 His office claimed that his attack was well received, and
630 that his mail ran 100-to-1 in favor of his position and even 4-to-1
631 in favor from lawyers. I personally do not doubt those claims, but
632 I do doubt that many of the people voicing their approval have
633 studied the modest proposals made by Mr. Quayle. He has not
634 devoted much of his time in public speeches talking about discovery
635 rules or the importance of funding alternative dispute resolution
636 procedures.³² Instead, his speeches repeat two themes:
637 (1) American lawyers and the American justice system have hampered
638 American business, and (2) this country has too many lawyers.

639 Intellectual consistency is not a hallmark of American
640 political rhetoric, but it is interesting that -- just two months
641 later -- the Vice President largely discarded any pretense that
642 there was substance to the charge about American lawyers being
643 responsible for a lagging American economy. At an appearance in
644 Chicago before the Litigation Section of the ABA, he disclaimed any
645 notion that lawyers played a significant role in the decline of

646 ³² In fact, the Vice President and the Bush Administration
647 did not support funding for alternative dispute resolution. They
648 wanted to "encourage" these techniques but not support them.

American competitiveness. Perhaps Mr. Quayle decided to review the materials concerning his prior assertions and realized that the facts did not support his prior statements.³³

If Vice President Quayle wanted to argue seriously that American industry is so hampered by our legal system, he would have to explain how Japanese cars, Korean videorecorders and German machine tools have competed so well in this country, even though they are subject to the same legal system. When the Ford Pinto and the Honda Accord have the same exposure to liability, the anti-competitiveness argument becomes pretty thin.

His second claim, that there are too many lawyers, suffers not only from the extravagant and entirely unsupported figures he uses³⁴ and his failure to calculate how many attorneys are likely to exist in totalitarian societies, but also from the obvious failure to suggest any remedy for this supposed evil. The Administration did not, after all, put forward a "Limitation of Lawyers Act of 1992," proposing some Japanese style trade association model of limiting the numbers of people who can obtain

³³ In the last decade there have been a large number of studies of American competitiveness by commissions and committees. I have looked at 14 of these, and there is simply no mention of lawyers or the justice system in any of these reports.

³⁴ For example, the claim that the United States has 70% of the world's lawyers has no factual basis. See Galanter, supra note _____, at 38-39.

674 the full privileges of practice.³⁵

675 Indeed, it would be curious if Mr. Quayle, who also
676 chaired the Council on Competitiveness, were even to propose such
677 an obviously anti-competitive measure. Nor is there any reason to
678 believe that a policy of closing down admission to the bar would be
679 ultimately very popular with anyone except those lawyers who feel
680 their economic fortunes would benefit from restricting competition.
681 Such a policy likely would draw opposition from women and
682 minorities who, for the first time, appear to be gaining strength
683 and recognition in the bar.

684 The Quayle attack was nothing more than political
685 rhetoric, but its continued use demonstrated that the Vice
686 President was touching some nerve. He was receiving positive
687 response for his attacks on lawyers.

688 This response did not escape President Bush's attention
689 and his remarks frequently drew on the same theme -- gratuitous
690 attacks on lawyers, essentially without any real point. In
691 announcing his plan for health care, President Bush identified

692 ³⁵ Tellingly, the administration did put forward a bill
693 entitled, "The Access to Justice Act of 1992," demonstrating that
694 they understand what Americans want out of their system. Sadly,
695 this bill was all title and no substance. If enacted, it would not
696 advance access in any significant way.

697 medical malpractice as a problem of health care delivery, and he
698 asked a question: Should you have to go through a lawyer to get to
699 a doctor? On the day following the announcement of his health
700 care plan, he again threw out a jibe: "If an apple a day keeps the
701 doctor away, what will keep lawyers away?"³⁶

702 The obvious answer to Mr. Bush's first statement is that
703 the system he decries does not require that someone go through a
704 lawyer to get to a doctor unless, of course, he is acknowledging
705 that physicians and hospitals will not provide further medical
706 treatment to malpractice victims unless suit is brought. Given the
707 context of his remarks, that was probably not his meaning.

708 Mr. Bush's second reference -- to the apple and keeping
709 lawyers away -- was, again, gratuitous, for nothing he proposed
710 would eliminate the medical malpractice system, but only cap
711 damages for the people most seriously injured.

712 This criticism of lawyers, not connected or, at best,
713 loosely connected with any proposed policy change, continued

714 ³⁶ President Bush's excuse for placing lawyers into the
715 health care debate was his claim that medical malpractice costs are
716 a significant part of health care costs. They aren't. The total
717 of all the liability insurance premiums and all costs of this
718 system constitute less than 1% of health care costs. Even
719 President Bush did not propose to do away with the entire system by
720 eliminating all rights of recovery.

because it was usually well received. Audiences applauded, some newspapers gave editorial praise, and approving letters were sent from the public. Mr. Bush carried the attack into the Republican convention with his reference to "tasseled loafered lawyers" but the whole attack sputtered and vanished largely because there was never any real program of reform behind any of these attacks.

All this demonstrates that lawyers are remarkably easy political targets. It seems curious that lawyers do not get angry at these attacks. Indeed, lawyers help propagate lawyer jokes, retelling the stories which, if told about ethnic or racial groups, would be deeply offensive. Perhaps lawyers are accustomed to criticism and have thickened their hides by enduring the exchange of charges, allegations, defenses, motions to disqualify, and the other incidents of life as a lawyer. Perhaps we have become jaded.

Perhaps lawyers even agree in some respects with the characterizations.

The Changing Place of Lawyers: From Community to Commerce

A recent project of the Young Lawyers Section of the American Bar Association has been the development of data on lawyers' dissatisfaction and the analysis of causes of that dissatisfaction. The Young Lawyers' survey shows that lawyer dissatisfaction is growing. There are other signs of this.

743 Deborah L. Aaron, in her book Running From the Law, subtitled "Why
744 good lawyers are getting out of the legal profession," gathers many
745 of the press reports of lawyer dissatisfaction and reports her
746 interviews with lawyers who have decided to abandon the practice of
747 law.³⁷ It is but one example of the growing literature about
748 lawyers who leave the practice. Another book by Richard W. Moll
749 entitled The Lure of the Law indicates that the law is,
750 increasingly, not so alluring even for those who have entered the
751 profession.³⁸

752 It appears that throughout history lawyers
753 have rarely been "liked" by laypeople,
754 although a grudging respect may be accorded.
755 And the anecdotal testimony in this book makes
756 it clear that lawyers often do not hold their
757 own in high regard. Consider this sampling of
758 adjectives used by our profiled now-or-former
759 lawyers to describe those in their profession:
760 parasitic, greedy, boring, myopic, intense,
761 manipulative, aggressive, driven, workaholic,

762 ³⁷ Deborah L. Aaron, Running from the Law (Ten Speed Press,
763 1991). See also ABA Young Lawyers Division, National Survey of
764 Career Satisfaction/ Dissatisfaction, I and II (1990).

765 ³⁸ Richard W. Moll, The Lure of the Law (Penguin, 1990), p.
766 215.

767 alcoholic, anxious, lonely. Yes, some
768 positive, or at least neutral, words crept in
769 -- professional, analytical, problem-solvers,
770 craftsmen -- but the negative labels have
771 predominated.

772 Mr. Moll quotes the lawyer/author, Scott Turow, who has said:³⁹

773 The law remains in some manner a troubled
774 profession. In spite of the prominence of
775 law, lawyers themselves aren't entirely well
776 regarded. Many lay people do not like
777 lawyers. And to a surprising extent, lawyers
778 often do not like themselves.

779 A recurring concern is that lawyers who once were
780 dedicated to a "true profession" are now more interested in
781 commerce. "Law has become a business" is often heard in
782 professional circles and Florynce Kennedy, a lawyer and feminist,
783 has her description for that business:⁴⁰

784 ³⁹ Id.

785 ⁴⁰ Quoted by Richard W. Moll, The Lure of the Law (Penguin,
786 1990), p. 6.

Ours is a prostitute society. The system of justice, and most especially the legal profession, is a whorehouse serving those best able to afford the luxuries of justice offered to preferred customers. The lawyer, in these terms, is analogous to a prostitute. The difference between the two is simple. The prostitute is honest -- the buck is her aim. The lawyer is dishonest -- he claims that justice, service to mankind is his primary purpose.⁴¹

If we step back and view the legal profession over a period of years, we realize that its great prosperity and accomplishments are driven by the same forces which have led to a decline of values.

In terms of educational requirements, the legal profession in the United States today stands at a position unknown in other societies. No other country requires so much formal education before entry into the profession. No other country

⁴¹ Florynce Kennedy is not the only person to use this analogy. Sidney Zion's review of a book about the fall of the Finley, Kumble law firm suggests that the firm was run like a brothel. Sidney Zion, "A Dangerous Species," New York Times Book Review, Nov. 25, 1990, p. 27.

requires so many examinations for entry into full national practice.⁴² If formal education standards are higher and tests more numerous, the potential rewards also are greater.

Why has this happened? The answer is not so clear, but Professor Calvin Woodard sees the development of the legal profession as an important step in the advancement of the United States as a commercial and political power.⁴³ The growth of the modern legal profession in the United States is tied with the growth of this country as a great commercial power.

As businesses have grown in size, so have the law firms which serve them. As corporations have extended their operations across the continent, law firms have developed multi-office and multi-state practices. As corporate activity has expanded to the international arena, U.S. law firms have begun to open branch offices in London, Paris, Brussels, Moscow, Tokyo and Hong Kong.⁴⁴

⁴² The way Japan defines lawyers and tests them for admission offers a model for those who would like to see more restrictive U.S. bar exams. Up through 1991, the Japanese exam for admission as bengoshi (those who had full privileges of the courts) was passed by only about 1% of those examined and the set number who pass each year -- 486 -- was the same for some years.

⁴³ Calvin Woodard, "Justice Through Law -- Historical Dimensions of the American Law School," 34 J. Legal Educ. 345, 368 (1984).

⁴⁴ See Richard L. Abel, American Lawyers 188-90 (Oxford, 1989) (elaborating upon the proliferation of American law firm branch offices in foreign cities).

838 The law profession has changed in the ways necessary to
839 accommodate changes in commerce. Of course, not all commerce is
840 vast and global and not all law practice is large-firm and
841 multi-state, but the trend has been toward practice in larger
842 firms. According to Professor Richard L. Abel, America's largest
843 firms grew moderately in the early and mid-20th century, then
844 accelerated after about 1960.⁴⁵ In 1950, America's fifty largest
845 law firms were comprised of an average of forty-four lawyers; by
846 1979, that average was up to 188 lawyers.⁴⁶ By another count, the
847 twenty largest firms in 1968 had an average of 128 lawyers; by
848 1979, that average almost doubled to 234 lawyers, and by 1987 the
849 average more than doubled again.⁴⁷

850 The large firms have had remarkable growth. Finley
851 Kumble began in 1968 with nine lawyers, grew to 57 lawyers in 1978,
852 and to 684 lawyers in 1987.⁴⁸ Skadden, Arps grew similarly, from
853 18 lawyers in 1967 to 818 lawyers in 1987.

854 ⁴⁵ Id. 182-83.

855 ⁴⁶ Id. at 183.

856 ⁴⁷ Id. Indicative of the revenues involved, one 230-lawyer
857 Boston firm issued a press release in 1987, stating that it had
858 "just completed the most successful financial year in its history,"
859 with revenues of \$70 million, up 25 percent from the previous year.
860 Id.

861 ⁴⁸ Id. at 184.

Professor Abel explains that this growth has changed the geography of law firms, as many have established multi-state and international practices.⁴⁹ By 1983, 93 of the nation's 100 largest firms had branches containing 25 percent of their lawyers.⁵⁰ In 1980, two-thirds of the country's multistate firms had branches in Washington, D.C., and a third had branches in New York City.⁵¹

Such mega law firms provide a very different culture from that of the small-firm or solo-practice culture more common in past generations. Obviously, a law firm of 25 or 50 requires a much more structured management than an office of one or two, or even 10 lawyers. As the size of firms has increased, management has become increasingly centralized.⁵²

The inevitable specialization of lawyers and of lawyer management in large firms has focused increased attention on the way such firms operate. Efficiencies have been achieved, production has been analyzed and the imperatives of modern commerce have begun to displace the random methods of a cottage industry. Computers have revolutionized the capacity to collect, report and

⁴⁹ Id. at 188-90.

⁵⁰ Id. at 190.

⁵¹ Id.

⁵² Id. at 199.

884 analyze data without much thought to the implications of the data
885 or much appreciation for the ability of lawyers to manipulate that
886 data.

887 Growing law firms have found they operate best in
888 downtown high-rise office buildings. Lawyers in these firms are
889 usually centered in the financial districts of large cities, housed
890 in imposing offices, guarded by receptionists and secretaries.

891 These developments have driven lawyers together in larger
892 and larger law firms in taller and taller office buildings, and
893 have removed lawyers from everyday contact with clients.
894 Increasingly, large law firms do business not with citizens who
895 walk into their street level offices, but with large enterprises
896 which have similarly centralized and specialized management,
897 similar imperatives of efficiency and production, and similar
898 tendencies to operate in multi-state and international arenas. The
899 business development lawyers, the "rainmakers," have contacts that
900 others, particularly associates, do not. Contact with the local
901 community is lessened, but also is less important for a lawyer's
902 advancement. In the same way that corporate managers come to think
903 of the corporation as their community, large firm lawyers think of
904 the law firm as their community.

905 The revision of the lawyer's concept of community has had

906 many consequences and one of the most disagreeable is that lawyers
907 today do not feel so constrained by the pressures of peer opinion
908 and adherence to common values. The phenomena of "Rambo"
909 litigators with a "take no prisoners" attitude has attracted a
910 great deal of attention in the bar as has the growing culture of
911 discourtesy. The following transcript, published by Harper's
912 Magazine may be an extreme case, but most trial lawyers have
913 witnessed similar exchanges:

914 From a transcript of a deposition taken last
915 May in St. Louis. Joseph Jamail, the
916 litigator who won a \$3 billion settlement for
917 Pennzoil against Texaco in 1987, represented
918 plaintiffs in a suit claiming that the
919 Monsanto Company had exposed residents of
920 Houston to dangerous chemicals. Edward
921 Carstarphen was the attorney for the defense.
922 Monsanto settled the case in July for \$39
923 million. The transcript appeared in the
924 October issue of American Lawyer, a monthly
925 published in New York City.

926 JOSEPH JAMAIL: You don't run this deposition,
927 you understand?

928 EDWARD CARSTARPHEN: Neither do you, Joe.

JAMAIL: You watch and see. You watch and see
who does, big boy. And don't be telling other
lawyers to shut up. That isn't your goddamned
job, fat boy.

CARSTARPHEN: Well, that's not your job, Mr.
Hairpiece.

WITNESS: As I said before, you have an
incipient--

JAMAIL: What do you want to do about it,
asshole?

CARSTARPHEN: You're not going to bully this
guy.

JAMAIL: Oh, you big tub of shit, sit down.

CARSTARPHEN: I don't care how many of you
come up against me.

JAMAIL: Oh, you big fat tub of shit, sit
down. Sit down, you fat tub of shit.⁵³

Most litigators could pull a similar exchange from their
deposition files. The rise of the large law firm, the advent of
high stakes litigation, the increasing isolation of judges from the
day-to-day workings of litigation have allowed this deterioration.

⁵³ Harper's Magazine, January, 1993, p. 32.

951 Most of all, it is the size of law firms which has changed the
952 profession and removed the profession from contact with the
953 community and from the peer pressure which formerly contained some
954 of this tendency.

955 When I joined a Miami law firm in 1962, my father was a
956 sole practitioner, the only lawyer in the small North Florida town
957 of Chattahoochee. A trip to my father's office was a visit with a
958 cross-section of the town. When he arrived in the morning, people
959 were waiting for him and others would drop in throughout the day.
960 He advised people who stopped him on the street and those who
961 joined him for morning coffee at the drugstore. At the barbershop,
962 he counseled the barber and anyone else who did not mind discussing
963 his affairs in that most public forum.

964 My father was keenly interested in how my "vast" firm (at
965 that time thirteen lawyers, the third largest in Miami) could
966 possibly operate. One day, he came to South Florida and visited
967 our offices. Arriving early, he sat in our waiting room while I
968 finished a project. When he came to my office, there was a worried
969 look on his face and he asked right away if everything was going
970 well with the law firm. I told him it was. He wasn't satisfied
971 and asked whether we had enough clients. Again I assured him, but
972 he was not convinced. "I was in your waiting room for almost a
973 half hour and no one came in," my father said, not understanding

974 that our corporate clients seldom came to the office and certainly
975 would not drop in without an appointment.

976 To my father, practicing law without constant face-to-
977 face contact with human beings was a notion too novel to be
978 accepted. As we contemplate the special place of lawyers in
979 American society, it is useful to think about how that special
980 relationship with the public has changed.

981 Today, I no longer practice law with a thirteen-person
982 firm on the fourteenth floor of a large office building. I now
983 practice with the same firm -- now one hundred and seventy-five
984 lawyers -- on the forty-first floor. I wonder how my father would
985 react.

986 With the special place of lawyers in society and with
987 material success, there is every reason to believe that lawyers
988 should be extremely satisfied. Increasingly, they are not.

989 An interesting insight came my way recently. I was
990 invited to speak to a luncheon of the Wisconsin Bar honoring
991 lawyers who had been members of the bar for fifty years. I asked
992 that their biographies and personal statements be sent to me
993 beforehand.

994 The day that material arrived, I had it on my desk
995 alongside documents on a project of the ABA Young Lawyers Section.
996 I looked first at the Young Lawyers material, which addressed the
997 subject of lawyer dissatisfaction. This material told me that
998 surveys conducted in 1984 and 1990 raised grave questions about
999 lawyers and their work. Significant numbers of lawyers regretted
1000 becoming lawyers and some planned to leave their profession. The
1001 ABA Journal reported the preliminary data of the 1990 survey:

1002 Never have so many who earn so much been so
1003 unhappy.

1004 That's the conclusion of a follow-up to a 1984
1005 survey of attorneys of all ages by the ABA
1006 Young Lawyers Division. The new findings show
1007 that 33 percent are "very satisfied" with
1008 their jobs - a drop from 41 percent in 1984.

1009 Of the remainder, 19 percent are dissatisfied,
1010 43 percent are somewhat satisfied and 5
1011 percent are neutral about their work.

1012 Nevertheless, even lawyers who like their work

1013 show telltale signs of burnout.⁵⁴

1014 The report of the Young Lawyers survey showed that the
1015 level of lawyer dissatisfaction is significant and growing, as
1016 demonstrated in the following two charts:⁵⁵

1017 Overall Satisfaction With Current Job

	<u>1990</u>	<u>1984</u>
1019 Very satisfied	33%	41%
1020 Somewhat satisfied	43%	40%
1021 Neutral	5%	4%
1022 Somewhat dissatisfied	14%	12%
1023 Very dissatisfied	5%	3%

1024 Dissatisfaction by Job Setting

	<u>Private Practice</u>		<u>Corporate Legal Dept.</u>		<u>Government</u>	
	<u>1990</u>	<u>1984</u>	<u>1990</u>	<u>1984</u>	<u>1990</u>	<u>1984</u>
1028 Very satisfied	32%	40%	31%	42%	26%	42%
1029 Somewhat satisfied	44%	40%	42%	38%	53%	34%
1030 Neutral	5%	4%	5%	7%	6%	4%
1031 Somewhat dissatisfied	14%	13%	16%	11%	12%	16%
1032 Very dissatisfied	5%	3%	7%	2%	4%	3%

1033 The survey tracked respondents to an earlier, 1984 survey
1034 which also showed that the satisfaction level of lawyers is
1035 declining.⁵⁶

1036 ⁵⁴ Stephanie Benson Goldberg, "One In Five Lawyers
1037 Dissatisfied," ABA Journal, p. 36 (Oct. 1990).

1038 ⁵⁵ ABA Young Lawyers Division, The State of the Legal
1039 Profession - 1990 [Pre-Publication Draft] 51 (1990).

1040 ⁵⁶ Id. at 52.

Overall Satisfaction with Current Job
For Longitudinal Respondents

	<u>1990</u>	<u>1984</u>
Very satisfied	29%	40%
Somewhat satisfied	42%	39%
Neutral	6%	4%
Somewhat dissatisfied	15%	15%
Very dissatisfied	8%	3%

This longitudinal data is even more revealing in that these respondents were further along in their careers (i.e., a higher percentage are partners now), better placed, and earning more money in 1990 than they were in 1984.⁵⁷ Theoretically, the respondents should be more satisfied than they were in 1984.

The report found women lawyers were less satisfied than their male colleagues. The report labeled the "most interesting fact" the discouraging finding that "dissatisfaction increased only minimally for junior associates while dissatisfaction for all other positions and solo practice increased significantly."⁵⁸

⁵⁷ Id. The survey showed the improvement in position:

Position of Longitudinal Respondents

	<u>1990</u>	<u>1984</u>
Partner/Executive	55%	45%
Senior Associate	14%	15%
Junior Associate/Staff Attorney	6%	19%
Solo Practice	21%	18%
Other	4%	3%

⁵⁸ Id. at 53. The report continued: "Clearly, dissatisfaction is no longer primarily a junior associate issue. Further, the same can be said about the variance of dissatisfaction

1070 The underlying reasons for the growing dissatisfaction
1071 were expressed as a growth in negative work environment factors.⁵⁹

1072 between types of firms - it is less than it was in 1984.
1073 Dissatisfaction has become a major problem throughout the
1074 profession." Id.

1075 ⁵⁹ Id. at 54-58. The report has the following summary
1076 charts and commentary:

		Work Environment Factors Percent of Individuals With Negative Experiences					
		Not Very Warm and Personal <u>Atmosphere</u>		Not Good Opportunity <u>to Advance</u>		Not Respected as Colleagues <u>by Superiors</u>	
		<u>1990</u>	<u>1984</u>	<u>1990</u>	<u>1984</u>	<u>1990</u>	<u>1984</u>
1082							
1083	Private Practice	12%	9%	24%	18%	9%	3%
1084	Corporate Counsel	23%	18%	50%	34%	18%	4%

1085 In 1984, the most important negative factor was the existence of
1086 political intrigue and back-biting, followed by an extreme lack of
1087 time. In 1990, the number of lawyers reporting negative
1088 experiences in these areas plus several others have increased.

		Work Environment Factors Percent of Individuals With Negative Experiences					
		Political Intrigue and <u>Backbiting</u>		Not Much Time <u>For Self</u>		Not Much Time <u>For Family</u>	
		<u>1990</u>	<u>1984</u>	<u>1990</u>	<u>1984</u>	<u>1990</u>	<u>1984</u>
1094							
1095	Private Practice	28%	18%	54%	46%	44%	35%
1096	Corporate Counsel	46%	36%	47%	31%	26%	19%

		Advancement Not Determined by <u>Quality of Work</u>		Not Good Opportunity for Professional <u>Development</u>	
		<u>1990</u>	<u>1984</u>	<u>1990</u>	<u>1984</u>
1100					

1101 After reviewing this survey, I had no doubt about the
1102 importance of the Young Lawyers project.

1103 Turning from that rather dismal project to the papers I
1104 had received from Wisconsin -- the material from lawyers who had
1105 been at the bar for fifty years -- I found the contrast startling.
1106 I was struck by how much satisfaction the Wisconsin lawyers
1107 conveyed. One of the questions asked was: "What additional
1108 thoughts do you have about your legal career?"

1109 Here are some of the responses which are typical of them
1110 all:⁶⁰

1111 "I have never for a single moment regretted my
1112 choice of the law over other professions."

1113 "I remember with great satisfaction that I
1114 practice with a profession in which a lawyer's
1115 word and representation can be relied upon,

1116	Private Practice	30%	14%	18%	11%
1117	Corporate Counsel	29%	30%	32%	25%

1118 Id. at 55.

1119 ⁶⁰ I recognize that these responses are not a scientific
1120 survey and that the respondents have been screened by their
1121 commitment to law practice for so many years, by their
1122 participation in the survey, etc.

1123 even if given orally over a phone."

1124 "I have spent a lifetime building a practice
1125 and am now serving the third and fourth
1126 generations. Part of my success in this
1127 rural area is due to the fact that I was born
1128 and raised on a farm and probably have milked
1129 as many cows by hand or with a machine as most
1130 of my clients. Clients respect not only my
1131 knowledge of farm law as well as on farming
1132 procedures. If and when I ever retire, I hope
1133 that I will be known as a lawyer who always
1134 gave good, prompt advice and was truthful."

1135 "It's been a lot of fun."

1136 "A very rewarding experience."

1137 "I have never been bored. The stress in a
1138 tough situation often builds up, but it feels
1139 so good when it is over, especially with a
1140 favorable result."

1141 "The practice of law has been a rewarding and
1142 joyful experience in the friends I have made,

1143 the personal satisfaction in being able to
1144 bring comfort to those in distress and the
1145 feeling of prestige I feel I have attained in
1146 the community for doing a good job to the best
1147 of my ability and conscience."

1148 "My legal career can be summed up thus:
1149 Recently I ran into my friend and client,
1150 John, on the street of our town. He said,
1151 "Ralph, you have been working for so very
1152 long, aren't you ever going to retire?" My
1153 response was, "John, I have not worked a day
1154 in my life. When my practice of the law
1155 becomes work, then I will retire."

1156 "I have enjoyed every minute of it! I'd like
1157 to be starting over!"

1158 Most of these lawyers had practiced in small towns and it
1159 occurred to me that perhaps it was the venue of their practice
1160 rather than their age difference which accounted for the glowing
1161 responses.

1162 The view of the small town lawyer as a happy and active
1163 member of the community is not entirely nostalgia. A recent book,

based on a study of lawyers in rural Missouri, has found that country lawyers are indeed tied to their communities and have a high morale. Don D. Landon's Country Lawyers: The Impact of Context on Professional Practice⁶¹ concluded that rural lawyers practiced "precisely where and how they intended,"⁶² and that they derived satisfaction from their community service. "Activity in politics, civic organizations and charities all have a rich bounty or recognition and esteem to award to a worthy participant."⁶³

As we think about the legal profession today, we recognize that our profession has never been more prosperous, more attractive to talented young people, more powerful, nor, in modern times, more scorned by the public. The most frightening discovery for me is that the angst within the profession, one which has a long history of angst, may also be at an all-time high. We are in agony, worried about the way the public sees us, worried about how we deal with one another, the courts, our clients. Worried about how we pass the traditions of our profession on to the next generation of lawyers.

⁶¹ New York: Praeger, 1990.

⁶² Id. at 56.

⁶³ Id. at 84. Landon uses the American Bar Foundation studies of the Chicago Bar for comparison. John P. Heinz and Edward O. Laumann, Country Lawyers: The Social Structure of the Bar, (New York: Russell Sage Foundation, 1982).

1188 If I were to attempt to sum up our problems in a single
1189 word, I would select the word "disconnected," for I believe that
1190 lawyers are increasingly disconnected -- disconnected from
1191 clients, disconnected from the judiciary, disconnected from one
1192 another, disconnected from the communities in which we live,
1193 disconnected even from the mechanisms which recruit and train the
1194 next generation of lawyers.

1195 The lawyers who have been selected through the most
1196 intricate academic screening processes in legal history, who have
1197 received the best education and now have jobs which provide the
1198 best material rewards, are, in large numbers, telling us that they
1199 are not happy.

1200 In a way, it is difficult to feel great sympathy for
1201 extremely well paid lawyers when they complain about their lot, but
1202 the contrast between these lawyers and those who have practiced for
1203 years suggests we may be losing our way.⁶⁴ Why?

1204 The first fact I would place in that examination is the
1205 nature of the practice and experience of the Wisconsin fifty-year

1206 ⁶⁴ I understand that the lawyers who answered the questions
1207 in Wisconsin were, in several senses, self-selecting, but my
1208 contact with lawyers around the country convinces me that the
1209 picture painted by these responses fairly depicts the attitude of
1210 most lawyers who have practiced for forty or fifty years.

members. Reading their biographies, I realized that every one of those lawyers was engaged throughout his career with public or community service. Some had served on their city councils or school boards, a few had been judges, many had been active in their churches, their bar associations, community charities. On the other hand, the 1990 survey of lawyers conducted by the ABA Young Lawyers Section provided data from a question which asked:

During the past year, how many **uncompensated** hours have you devoted to the following public service activities either (a) as part of your job, that is your firm/employer was not compensated but these hours were considered by your employer as a legitimate part of your total hours worked, and (b) not as part of your job?⁶⁵

The responses from lawyers in private practice were tabulated in this table:⁶⁶

⁶⁵ ABA Young Lawyers Division, National Survey, supra note *, at 32.

⁶⁶ Id.

		Number of Hours During the Year Spent by Private Practitioners on Pro Bono/Public Service							
		Part of Job				Not Part of Job			
		<u>None</u>	<u>1-25</u>	<u>26-74</u>	<u>75+</u>	<u>None</u>	<u>1-25</u>	<u>26-74</u>	<u>75+</u>
1233	Pro Bono Delivery:								
1234	Through organized								
1235	pro bono program	75%	16%	5%	3%	93%	5%	1%	0%
1236	Not through organ-								
1237	ized program	59%	30%	8%	4%	79%	15%	4%	3%
1238	Bar association work	70%	20%	7%	4%	86%	11%	2%	1%
1239	Other civil/public								
1240	service work	63%	22%	8%	7%	52%	23%	12%	14%

1243 The information from this 1990 survey is consistent with
1244 the results of the 1984 survey. Moreover, the report shows that
1245 lawyers working in corporate or government jobs do far less pro
1246 bono work. The report states that 98% of government and corporate
1247 lawyers "do no pro bono work in an organized program as part of
1248 their job." (Report, page 32.)⁶⁷

1249 If the Young Lawyers survey is correct, lawyers who do
1250 pro bono work do so without much direct encouragement from the law
1251 firms. The following table shows the crediting by law firms:⁶⁸

1252 ⁶⁷ Id.

1253 ⁶⁸ Id. at 33.

Percentage of Lawyers in Private Practice
Whose Firms Credit Pro Bono and Bar Hours
to Billable Hour Requirements

1254		
1255		
1256		
1257	All pro bono hours are credited	12%
1258	All pro bono and bar association hours are credited	4%
1259	A portion of pro bono hours are credited	4%
1260	A portion of pro bono and bar associations hours	
1261	are credited	4%
1262	No hours are credited	76%

1263 This survey tells me that most lawyers are not that much
1264 engaged with public service, pro bono work for the poor, or even
1265 bar work, and that public service work is not much valued by the
1266 law firms.

1267 The concern with the professional aspects of lawyers is
1268 very much in vogue these days, and many bar associations have
1269 followed the American Bar Association into the area of
1270 "professionalism" with task forces, orientation for young lawyers,
1271 special oaths and continuing education. Some of this work has
1272 seemed unfocused, some of it probably is silly, but it all
1273 indicates a search for the meaning of the legal profession, an
1274 attempt to reestablish an attitude of mutual respect and courtesy.

1275 Most of the dialogue about professionalism is conducted
1276 against the background of an earlier, somewhat mythical time when
1277 lawyers worked in fellowship, when law firms were small enough so
1278 people actually knew their partners, when loyalty was expected and
1279 when clients were friends -- the days before "law became a

1280 business."

1281 There is much to this idea and there is no doubt that
1282 lawyers have been drawn down a dangerous path with the emphasis on
1283 office economics. This path has been all the more perilous because
1284 computers now allow law firms to churn out management data.
1285 Lawyers get daily or weekly reports analyzing their "numbers" --
1286 the hours billed, the billable hours actually billed, the billable
1287 hours billed which have been collected, etc., etc., etc., all set
1288 against an overhead factor and a lawyer's salary which, when
1289 netted, tells the lawyer in quick summary what his or her worth is.
1290 This approach to law firm management emphasizes pure economics and
1291 has led lawyers to many of the new practices which have made the
1292 practice of law seem less professional. Physicians and dentists
1293 have taken the same path with devastating results to the humanity
1294 of those professionals.

1295 The movement which has led us to become more businesslike
1296 (and less human) is one of two forces which has played a role in
1297 the dissatisfaction of lawyers. The other, I submit, is the
1298 rejection of the heroes and the myths of the law, due greatly to
1299 the success of the important intellectual movement we know as
1300 "legal realism."

1301 The legal realists helped American lawyers put aside some

of the worst aspects of formalism and, through careful analysis and good writing, convinced most law professors and law students that law should be approached with an eye open to the realities of judicial decision-making and the motivations of those in power. In bringing lawyers to look at law -- the legislative and the adjudicative processes -- in a coldly realistic way, the legal realists urged us away from ceremony and away from myths. As an example, I turn to Judge Jerome Frank, one of the greatest of the legal realists. In his work, Jerome Frank sought to force a hard and honest look at legal institutions, rejecting the myths and romanticism about the law. He wrote derisively of "The Cult of the Robe" in his book, Courts on Trial,⁶⁹ urging judges to adopt a less formal and more open style.

⁶⁹ Frank, supra note _____*, at 254. Frank states:

An important deterrent to public comprehension of the human characteristics of judges is the curious way in which they dress. The pretense that judicial reactions are uniform manifests itself in the demand that judges wear uniforms.

In the service of our federal government, no one other than judges wears a uniform except members of the armed forces, elevator-starters and operators. The costumes of the servicemen and of the elevator-workers have utility. The robe of the judge is an antique garment, awkward, impractical, and, to the dispassionate eye, of no aesthetic value. It is of a piece with the "Hear ye! Hear ye!" that opens court sessions, and the quaint medieval Latin and the obsolete Norman French often incorporated in judicial opinions.

Id.

1332 I count myself as a legal realist, but I have increasing
1333 doubts about the wisdom of entirely displacing myths and ceremony
1334 from the law. If we debunk ceremony, we may not take so seriously
1335 our "investiture" as lawyers and we may not be moved to regard the
1336 words of our formal oath as a "solemn pledge." Indeed, lawyers
1337 seem to have forgotten that their entry into the profession was the
1338 occasion of our oath-taking.

1339 From the beginning of law school, where students are
1340 taught to "think like lawyers," we attempt to elevate the
1341 analytical and dispassionate. Myths have little place in legal
1342 education. A law professor who indulges in "war stories" is
1343 scorned by the academy and there are only a few courses which
1344 examine the role of lawyers in history or literature. Hardly
1345 anywhere do we seriously look at the lives of the great lawyers and
1346 judges. The triumph of legal realism has left little place for
1347 discussion of the traditions of the bar. There are few heroes.

1348 In some respects, this valuable intellectual movement has
1349 done more to cause the current distress about "professionalism"
1350 than the more ruthless forces of law-office economics. We need
1351 today to find a way to pursue the intellectual benefits of legal
1352 realism while recognizing that traditions are important in
1353 establishing the standards of the profession, setting up models
1354 against which we will judge our own accomplishments as

1355 professionals.

1356 We have become discontent as lawyers, not just because
1357 the business aspects of law are unpleasant, but because we have
1358 ceased to believe in ourselves or our mission.

1359 * * *

1360 There is a certain symmetry in the causes of lawyer
1361 dissatisfaction and the causes of public dissatisfaction with
1362 lawyers, and both of these derive from the loss of connectedness by
1363 lawyers. Increasingly, lawyers serve corporate interests and not
1364 individuals. Where once we were easily available to persons who
1365 walked down Main Street, U.S.A., we now practice in forbidding
1366 offices high above the business districts. We don't serve people
1367 so much these days, and people don't rely on us so much. Robert
1368 Bellah and his colleagues summed up what has happened to
1369 professions in modern American life in their 1985 book whose title,
1370 Habits of the Heart, is drawn from a de Tocqueville phrase. Bellah
1371 wrote,⁷⁰

1372 "Profession" is an old word, but it took

1373 ⁷⁰ Robert Bellah, et al., Habits of the Heart: Individualism
1374 and Commitment in American Life, 119-20 (Univ. of Calif. Press,
1375 1985).

1376 on new meanings when it was disconnected from
1377 the idea of a "calling" and came to express
1378 the new conception of a career. In the
1379 context of a calling, to enter a profession
1380 meant to take up a definite function in a
1381 community and to operate within the civic and
1382 civil order of that community.

1383 Bellah continued,

1384 The profession as career was no longer
1385 oriented to any face-to-face community, but to
1386 impersonal standards of excellence, operating
1387 in the context of a national occupational
1388 system. Rather than embedding one in a
1389 community, following a profession came to
1390 mean, quite literally, "to move up and away."

1391 American lawyers deserve high praise for promoting
1392 professional excellence. Those accomplishments need not be
1393 abandoned in order for us to now reconnect lawyers to their
1394 communities.

1395 It is not enough to say that lawyers are not so different
1396 from other professionals, for it is the very nature of the legal

1397 profession that we are sustained by the community interest in
1398 justice, and when we are removed from the community and separated
1399 from that interest, we find ourselves dissatisfied and we find that
1400 others are dissatisfied with us.

Chapter Three

PROFESSING

In our legal system, we place much stock in the idea of contracts and covenants. Our constitutional system is heavily laden with the notion of a contractual arrangement through which the government came into existence. The very theory of the profession is also related closely to contract because the legal professionals receive their special recognition, their franchise, from the state in return for an undertaking to perform some needed function with competence and a concern for the public interest.

Most professionals do not think too much about this bargain, but nevertheless perform it, attempting to maintain and improve professional competence and abide by a code of conduct. To some observers, this very effort to improve professional standards and prescribe conduct is an effort to restrict competition and artificially inflate the value of services.

Professor Abel is skeptical about the motivation of lawyers: "It is always risky to impute motives, particularly bad motives Yet the evidence is overwhelming that lawyers became increasingly anxious about their numbers and status as the

twentieth century progressed."⁷¹ He quotes the influential dean of the University of Chicago Law School, John Henry Wigmore, who urged in 1915 that lawyers be required to have two years of college, as "a rational, beneficent measure of reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the bar."⁷²

There is a great deal of historical evidence to support Professor Abel. During the Great Depression, Pennsylvania authorized county bar associations to limit the number of entrants to the bar, often to the number of bar members who died or retired that year.⁷³ Defending similar measures to limit entrance to the New York City bar, Columbia Law School Dean Young B. Smith wrote in 1937:

During the last ten years, more than 20,000 young men have been admitted to the bar in the city of Greater New York alone which is at least twice as many as the bar of this city

⁷¹ Abel, supra note _____*, at 47. It is interesting to consider Professor Abel's observations in context of the charge that the United States has seventy percent of the world's lawyers.

⁷² Id. (quoting John H. Wigmore and Fredric B. Crossley, A Statistical Comparison of College and High School Education as a Preparation for Legal Scholarship, 965.

⁷³ Id.

1445 has been able to absorb. . . . The
1446 consequences have been not only disastrous to
1447 thousands of the young men, but they also have
1448 created a serious menace to the community.⁷⁴

1449 Responding to sentiments for limiting the number of lawyers during
1450 the Depression, bar examiners produced sharply lower pass rates
1451 during those years.⁷⁵ Dean Charles Clark of the Yale Law School
1452 stated, "[o]bviously the bar examiners are applying some sort of
1453 quota now as they certainly should and must."⁷⁶

1454 As Abel concluded, "Throughout the first half of the
1455 twentieth century, much of the profession's collective energy was
1456 devoted to constructing entry barriers that would control both the
1457 number of lawyers and their characteristics."⁷⁷

1458 But this evidence, drawn from the first half of the
1459 century, is contradicted by the extraordinary statistics of a
1460 growing bar, burgeoning law school enrollments and bar support for
1461 financial aid and affirmative action. Control over entry to the

1462 ⁷⁴ Id. (quoting Young B. Smith, Take the Profit Out of Legal
1463 Education, (1937)).

1464 ⁷⁵ Id. at 64-65.

1465 ⁷⁶ Id. at 65.

1466 ⁷⁷ Id. at 71.

profession has eroded in recent decades, as public universities have established scores of new law schools and courts have struck down many of the most blatant restrictions on entry to the legal profession. Yet lawyers still retain great control. Abel states that

the lawyers' monopoly survives, if in narrowed form, states continue to protect their bars against external competition, few lawyers engaged in price competition, the most effective forms of promotion remain illegal, and specialization offers new havens from intraprofessional competition.⁷⁸

This criticism of the profession and its motivation stirs lawyers to anger and is more threatening because state legislatures and federal regulatory agencies may be influenced by such thoughts.

Curiously, this criticism which accuses the bar of anti-competitive behavior gets appreciative nods of approval from a public which also approved former Vice President Dan Quayle's suggestion that there are too many lawyers in the United States, and suggests -- erroneously -- that the United States has 70% of

⁷⁸ Id. at 126.

the world's lawyers.⁷⁹ Few people pause to contemplate the contradictions or, if they do, perhaps adhere to their belief in an anti-competitive bar by concluding that the conspiracy has not been effective.

Within the legal profession, there is a great deal of talk about the special obligation of lawyers, about the concept of the law as a public profession and about the role of lawyers in society. After all, we were identified by de Tocqueville as the "aristocrats" of this nation. We are the profession of Jefferson and Madison and Lincoln. Our pride in this prominence, indeed, the prominence itself, requires us to ask ourselves, "What is it we profess?" The very idea of a profession is deeply rooted in religion.

John Osborne's play about Martin Luther opens with a scene in which Luther is invested in the Augustian Order.⁸⁰ Luther is robed with the habit and hood and then the prior divests him of the "former man and all his works."⁸¹ The prior then says, "The Lord invest you with the new man."⁸² Martin's response to this

⁷⁹ Dan Quayle, An Address to the House of Delegates of the American Bar Association, (August 1991).

⁸⁰ John Osborne, Luther 13 (London: Faber and Faber, 1961).

⁸¹ Id.

⁸² Id.

1511 investiture is an oath which begins with the words, "I, brother
1512 Martin, do make profession and promise obedience . . . etc."⁸³
1513 This was Martin Luther's profession.

1514 In this scene, Martin Luther's father, Hans, obviously
1515 unhappy with Martin's decision to become a monk, complains to his
1516 friend that Martin was wasting his talent and education. "He could
1517 have been a man of statute," Hans laments, adding, "He could have
1518 been a lawyer."⁸⁴

1519 What if Martin had become a lawyer?

1520 I don't know the lawyer's oath in Germany in 1506, but I
1521 do know the oath we now take when lawyers are "called" to the bar
1522 and "invested." This oath, usually taken in a solemn ceremony, is
1523 the beginning point for the professional.

1524 The oath I took, derived from a Swiss lawyer's oath, is
1525 lengthy. It states:

1526 ⁸³ Id.

1527 ⁸⁴ Id. at 20.

1528 I do solemnly swear:⁸⁵

1529 I will support the Constitution of the
1530 United States and the Constitution of the
1531 State of Florida.

1532 I will maintain the respect due to Courts
1533 of Justice and judicial officers;

1534 I will not counsel or maintain any suit
1535 or proceeding which shall appear to me to be
1536 unjust, nor any defense except such as I
1537 believe to be honestly debatable under the law
1538 of the land;

1539 I will employ for the purpose of
1540 maintaining the causes confided to me such

1541 ⁸⁵ The preliminary sentence and oath from the rules adopted
1542 by the Florida Supreme Court on January 27, 1941, and amended on
1543 January 1, 1986 states:

1544 Oath of Admission

1545 The general principles which should ever
1546 control the lawyer in the practice of his
1547 profession are clearly set forth in the
1548 following oath of admission to the Bar, which
1549 he is sworn on admission to obey and for the
1550 wilful violation to which disbarment may be
1551 had.

1552 means only as are consistent with truth and
1553 honor, and will never seek to mislead the
1554 Judge or jury by any artifice or false
1555 statement of fact or law;

1556 I will maintain the confidence and
1557 preserve inviolate the secrets of my clients,
1558 and will accept no compensation in connection
1559 with their business except from them or with
1560 their knowledge and approval;

1561 I will abstain from all offensive
1562 personality and advance no fact prejudicial to
1563 the honor or reputation of a party or witness,
1564 unless required by the justice of the cause
1565 with which I am charged;

1566 I will never reject, from any
1567 consideration personal to myself, the cause of
1568 the defenseless or oppressed, or delay any
1569 man's cause for lucre or malice. So Help Me
1570 God.

1571 This "profession" is our contract with the public, a
1572 contract agreed to in front of an oath taker, usually a judge. An

1573 oath for lawyers is common in other countries, but there are some
1574 places -- China, for instance -- where there is no lawyer's oath⁸⁶
1575 and there have been occasions when the lawyer's oath was one we
1576 would find obnoxious to the ideals of the independent profession.⁸⁷

1577 The oath is lengthy and perhaps, in some respects,
1578 archaic. Not many lawyers remember their oath in the way that
1579 other oaths are remembered and repeated. Former Boy Scouts and
1580 Girl Scouts can usually recite their Scout Oaths and virtually all
1581 Americans know the Pledge of Allegiance by heart. The Apostles'
1582 Creed or other statements of religious belief are normally
1583 committed to memory.

1584 Just as we might question whether people believe in their
1585 religious oaths, so too might we question whether lawyers stand by
1586 their professional oaths. Probably not many people exist today who
1587 feel as passionately about oaths as Sir Thomas More, the central
1588 figure in Robert Bolt's play, A Man for All Seasons. In the play,
1589 More agonizes over an oath conceding Henry VIII's authority over

1590 ⁸⁶ As the People's Republic of China rebuilds the legal
1591 profession after it was essentially dismantled by the Cultural
1592 Revolution, it is interesting to think of how there will be a
1593 profession of law without a profession or oath.

1594 ⁸⁷ The lawyers in Nazi Germany swore an oath to Hitler, and
1595 the bar became subservient to the state.

1596 the church and his independence from the authority of the Pope.⁸⁸
1597 More's daughter, Margaret, urges him to "say the words of the oath
1598 and in your heart think otherwise," but More refuses:

1599 ...When a man takes an oath, Meg, he's holding
1600 his own self in his own hands. Like water.
1601 ... And if he opens his fingers then -- he
1602 needn't hope to find himself again. ...⁸⁹

1603 Lawyers' adherence to their oaths may also be hampered by
1604 their lack of familiarity with it, for most lawyers have never
1605 heard the oath before they are asked to take it -- there is no
1606 preparation in law school for this event -- and the lengthy oath is
1607 very easy to forget.

1608 Perhaps lawyers need to have a simple oath, one that
1609 could be easily remembered. The oathtaking is serious business and
1610 lawyers could benefit from an oath which is easy to remember. A
1611 great deal of recent work has been devoted to this idea. In
1612 Georgia, the Chief Justice's Commission on Professionalism proposed

1613 ⁸⁸ Robert Bolt, A Man for All Seasons (1960).

1614 ⁸⁹ Id. at 81.

1615 this Lawyer's Creed:⁹⁰

1616 A LAWYER'S CREED

1617 To my clients, I offer faithfulness,
1618 competence, diligence, and good judgment. I
1619 will strive to represent you as I would want
1620 to be represented and to be worthy of your
1621 trust.

1622 To the opposing parties and their
1623 counsel, I offer fairness, integrity, and
1624 civility. I will seek reconciliation and, if
1625 we fail, I will strive to make our dispute a
1626 dignified one.

1627 To the courts, and other tribunals, and
1628 to those who assist them, I offer respect,
1629 candor, and courtesy. I will strive to do
1630 honor to the search for justice.

1631 To my colleagues in the practice of law,

1632 ⁹⁰ ABA Commission on Professionalism, "...In The Spirit of
1633 Public Service:" A Blueprint for the Rekindling of Lawyer
1634 Professionalism, 10 (1986) (citing Roscoe Pound, The Lawyer From
1635 Antiquity to Modern Times, 5 (1953)).

1636 I offer concern for your welfare. I will
1637 strive to make our association a professional
1638 friendship.

1639 **To the profession,** I offer assistance. I
1640 will strive to keep our business a profession
1641 and our profession a calling in the spirit of
1642 public service.

1643 **To the public** and our systems of justice,
1644 I offer service. I will strive to improve the
1645 law and our legal system, to make the law and
1646 our legal system available to all, and to seek
1647 the common good through the representation of
1648 my clients.

1649 This seems to me to be an improvement on the oath I took,
1650 even though the clarity of the language relating to the obligation
1651 to the "defenseless or oppressed" is obscured.

1652 It is worthwhile to once again focus on creeds and oaths.
1653 The importance of professing in our society is obvious -- the
1654 United States Constitution and state constitutions provide for
1655 oaths of office, and new citizens of this country are required to
1656 take an oath. We are accustomed to frequent recitation of the

1657 pledge of allegiance to our national symbol, the flag. Even though
1658 the Pledge of Allegiance has no ancient or constitutional roots and
1659 was originated in this century by a magazine author, the pledge has
1660 played a major role in modern political debate. George Bush used
1661 Michael Dukakis' veto of an act compelling teachers' participation
1662 in the Pledge of Allegiance as a major campaign issue.

1663 Certainly lawyers believe in oaths. We rely on sworn
1664 testimony and still reinforce the importance of truthfulness by
1665 both a ceremony (the witness stands and is sworn by a court
1666 official before testifying) and by stiff penalties for perjury.

1667 Yet, ask a lawyer today, "What do lawyers profess?" and
1668 you are likely to be greeted with a blank stare. Ask, "What is
1669 your oath as a lawyer?" and you may get an occasional articulate
1670 statement, but most lawyers have put behind them their investiture
1671 and don't really remember their oath. Perhaps oaths are not so
1672 important today. Archibald MacLeish's poem, Metaphor⁹¹ warns us
1673 of the consequence:

1674 A world ends when its metaphor has died.

1675 An age becomes an age, all else beside,

1676 ⁹¹ Archibald MacLeish, Collected Poems, 1917-1982 (Boston:
1677 Houghton Mifflin, 1985).

1678 When sensuous poets in their pride invest
1679 Emblems for the soul's consent
1680 That speak the meanings man will never know
1681 But man-imagined images can show:
1682 It perishes when those images, though seen,
1683 No longer mean.

1684 I have often thought about the wonder of the legal
1685 profession in our system -- that one branch of government is given
1686 over to this one profession and that this branch is given the power
1687 of regulation over the profession and given the power of judicial
1688 review.

1689 Society has largely trusted lawyers to keep the contract,
1690 to abide by the oath. Lawyers still speak of being "called" to the
1691 bar. We have taken the oath of investiture. We have, in some
1692 respects, put aside the person we were before being invested and
1693 have taken on a new role.

1694 Because we are privileged to practice in a profession
1695 which is in large measure self-regulating, we have a special duty
1696 to see that our oath is kept, our contract performed, our

1697 profession maintained.⁹²

1698 ⁹² There was a university honor system in place at the small
1699 Southern college where I was graduated, formally named the
1700 University of the South, but known by the name of the small
1701 Tennessee town in which it is located, Sewanee. At Sewanee, the
1702 professors and deans believed in the honor system and students were
1703 given immense freedom, consistent with the expectation that we
1704 would abide by our oaths. Time-restricted, closed book, take-home
1705 tests were frequently administered. By contrast, I have been at
1706 universities where virtually the same student honor code oath is
1707 taken but people do not trust the oath takers. There, exam
1708 procedures feature strict instructions, timekeepers and monitors.

1709 Chapter Four

1710 THE SPECIAL DUTY OF LAWYERS: ACCESS TO JUSTICE

1711 After lawyers become invested in the bar and profess
1712 their oath, they enter into a modern, prosperous and largely self-
1713 regulating profession. Lawyers have a special pride, for we can
1714 claim a long and honorable history, a history far more rich than
1715 that of most other modern professions. After all, the jibe goes,
1716 aren't physicians really the successors of barbers⁹³ and who knows
1717 where some of the other modern claimants come from.⁹⁴ The legal
1718 profession has been identified with public service since the late
1719 11th and early 12th century, when clerics, learned in the law,
1720 began to serve the crown.⁹⁵

1721 So, the practice of law is a profession, but what does
1722 that mean? Dean Roscoe Pound defined the term "profession":

1723 The term refers to a group . . . pursuing a

1724 ⁹³ The physician claim to ancient profession is, of course
1725 substantial, but the elements of modern professional status came to
1726 the medical profession rather late.

1727 ⁹⁴ Three Seattle University professors recently made a
1728 documentary film about Luca Bartolomes Pacioli, an accomplished
1729 Renaissance man considered to be the father of double-entry
1730 bookkeeping. Calvin Trillin, "Don't Write Off the Accountants,"
1731 The Philadelphia Inquirer, Apr. 5, 1991, at 19-A.

1732 ⁹⁵ The Western legal tradition finds its origins in this
1733 period. See Harold Berman, Law and Revolution, (Harvard, 1983).

learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.⁹⁶

The legal profession shares common elements of other professions, elements which Professor Elliot Friedson of New York University stated in his definition of the term "profession":

An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:

1. That its practice requires substantial intellectual training and the use of complex judgments.

2. That since clients cannot adequately evaluate the quality of the service, they must trust those they consult.

⁹⁶ ABA Commission on Professionalism, "...In The Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism", 10 (1986) (citing Roscoe Pound, The Lawyer From Antiquity to Modern Times, 5 (1953)).

1756 3. That the client's trust presupposes that
1757 the practitioner's self-interest is
1758 overbalanced by devotion to serving both
1759 the client's interest and the public
1760 good, and

1761 4. That the occupation is self-regulating --
1762 that is, organized in such a way as to
1763 assure the public and the courts that its
1764 members are competent, do not violate
1765 their client's trust, and transcend their
1766 own self-interest.⁹⁷

1767 I want to focus on one of these characteristics of
1768 professions -- the element of self-regulation -- which, under many
1769 state constitutions, is an authority derived from the courts rather
1770 than the legislature.⁹⁸

1771 The power to regulate the practice of law and to

1772 ⁹⁷ Id. The definition was prepared by Prof. Friedson
1773 especially for the Report of the Commission on Professionalism.
1774 Among his published works on the sociology of professions are:
1775 Profession of Medicine (1970); The Theory of Professions: State of
1776 the Art, in The Sociology of the Professions 19 (Dingwall and
1777 Lewis, eds. 1983); and The Changing Nature of Professional Control,
1778 10 Ann. Rev. Soc. 1 (1984)).

1779 ⁹⁸ See, e.g., Fla. Const. Art. V, §15.

1780 prosecute those lawyers who intrude into the forbidden areas is a
1781 great power, a power which can dampen competition. This power can
1782 be justified only if it is utilized in the public interest and,
1783 since the very existence of the power is under constant challenge
1784 by academic lawyers, state legislators and public interest
1785 organizations, the bar and the courts have learned that it must be
1786 exercised very carefully. To abuse such power is to invite its
1787 elimination and the loss of self-regulation. Because of these
1788 realities, lawyers must be very wary of defining the practice of
1789 law in a way which deprives citizens of services or forces the cost
1790 of those services to an artificial level.

1791 Still, the power of regulation allows lawyers, usually
1792 operating through bar associations or court-appointed committees,
1793 to fashion the rules of the practice of law beginning with its very
1794 definition.⁹⁹ Although this definitional process may seem to

1795 ⁹⁹ Florida's Justice Gerald Kogan made this point when he
1796 wrote a dissenting opinion in a case which resulted in a
1797 "comprehensive" pro bono plan. Urging that there should be a
1798 mandatory pro bono plan, In Re Amendments to Rules, 598 So.2d 41, 60
1799 (Fla. 1992), he said, 598 So.2d at 60:

1800 . . . the criticisms leveled at us by the public
1801 clearly have some merit. In Florida, as in many other
1802 states, the right to practice law is a franchise both
1803 conferred and regulated by the practitioners themselves.
1804 Our own Constitution requires that the practice of law be
1805 regulated exclusively by the seven attorneys who are
1806 privileged to be Justices of this Court. Art. V, § 15,
1807 Fla. Const. In the popular eye, this arrangement looks
1808 suspiciously like the foxes are establishing the rules of
1809 access to the henhouse. Try as we may, the Florida legal

1810 operate with rules which are at times quite vague, the enforcement
1811 mechanisms of unauthorized practice of law ("UPL") committees has
1812 provided pressure on outsiders who venture too far into the domain
1813 of lawyers.

1814 Since the profession (with approval of the courts) has
1815 substantial control over the process through which it is determined
1816 what is and is not the practice of law, the profession has not only
1817 the franchise over legal services, but also the power to expand or
1818 contract that franchise. Questions arise in context of other
1819 professions. (What services can an accountant or financial
1820 consultant provide? What is the boundary between the real estate
1821 lawyer and the real estate agent?) Questions also arise when
1822 persons not admitted to professional status render services which
1823 lawyers claim to be legal services.

1824 A case addressing a question in this second category came
1825 to national attention when The Florida Bar prosecuted Rosemary
1826 Furman, a former legal secretary who developed a business helping
1827 people fill out legal papers and frame legal documents.¹⁰⁰ The

1828 profession will never shake this unseemly image until we
1829 have demonstrated to the public that we take our
1830 Constitution seriously and that we will live up to its
1831 dictates, even if it diminishes our own pocketbooks. The
1832 time has come for us to do just that.

1833 ¹⁰⁰ The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979).

1834 Florida Bar brought an action and tried it before a referee who
1835 found against Furman and recommended sanctions.¹⁰¹ Upon arguing
1836 the referee's report and recommendation before the Florida Supreme
1837 Court, Rosemary Furman's lawyer, the public interest attorney Alan
1838 Morrison, presented a variety of arguments and asserted that Ms.
1839 Furman was actually helping the people she was dealing with because
1840 they otherwise would not be able to afford the services she
1841 provided. Although in a later, related case there was abundant
1842 evidence to show harm caused by the improper handling of those
1843 matters for her "customers,"¹⁰² there was a great deal of
1844 attention given to her case and considerable sympathy in the media.

1845 Although the impression created by press reports was that
1846 the court was suppressing a paralegal who was helping to fill the
1847 gap created by the high costs of legal services, I believe this
1848 case correctly upheld the standards of legal services, prohibiting
1849 substandard services which actually harmed clients. The real
1850 significance of the case is that it began a close inspection of
1851 legal services by a tenacious court.

1852 The Florida Supreme Court held against Rosemary Furman,
1853 but Morrison's suggestion that lawyers were not available to help
1854 the people who were served by Rosemary Furman was the basis of a

1855 ¹⁰¹ Id. at 378-81.

1856 ¹⁰² The Florida Bar v. Furman, 451 So.2d 808, 814 (Fla.
1857 1984).

1858 very important step by the court. Reacting to the argument
1859 advanced by Alan Morrison, the Court went beyond the question of
1860 Rosemary Furman's guilt and punishment to the question of the
1861 availability of legal services in civil matters, acknowledging its
1862 own role: "Without question, it is our responsibility to promote
1863 the full availability of legal services."¹⁰³ It then directed the
1864 Florida Bar to conduct a study on the availability of legal
1865 services and recommend measures to address the problem.¹⁰⁴ The
1866 "Furman Report" of The Florida Bar was the result, and that study
1867 concluded that there was a great gap in the availability of legal
1868 services. The study made numerous recommendations to simplify
1869 legal procedures and expand voluntary pro bono activities.

1870 Since the court-ordered Furman study in Florida, there
1871 have been similar studies in many states, all of them demonstrating
1872 an extremely large unmet legal need of poor people. The
1873 overwhelming evidence from these studies is that eighty percent of
1874 the legal needs of the poor are unmet.

1875 I want to briefly digress from the legal profession to
1876 the medical profession.

1877 ¹⁰³ 376 So.2d at 382.

1878 ¹⁰⁴ 376 So.2d at 382.

1879 In May 1991, Dr. George Lundberg, editor of the AMA
1880 Journal, published an editorial in which he criticized the state of
1881 health care in this country and stated that it is no coincidence
1882 that the United States and South Africa are the only developed
1883 countries that do not have a national health policy that ensures
1884 access to basic care for all. Dr. Lundberg attributed inequity in
1885 access to health care in the United States in part of "long-
1886 standing, systematic, institutionalized racial discrimination."¹⁰⁵

1887 In his bold editorial, he was concerned that in this
1888 wealthy country, 31 to 37 million Americans don't have any health
1889 care insurance and millions more do not have adequate coverage.
1890 Dr. Lundberg called for reform saying:

1891 An aura of inevitability is upon us. It
1892 is no longer acceptable morally, ethically or
1893 economically for so many of our people to be
1894 medically uninsured or seriously
1895 underinsured.¹⁰⁶

1896 ¹⁰⁵ George D. Lundberg, "National Health Care Reform: An
1897 Aura of Inevitability is Upon Us," Journal of the American Medical
1898 Association (May 15, 1991) p. 2566.

1899 ¹⁰⁶ Id.

1900 Dr. Lundberg's remarks serve as a reminder of the high
1901 purpose and goals of the medical profession.

1902 What can we say about our legal system?

1903 Can we agree that there is no industrialized country in
1904 Western civilization, excepting only South Africa, which is so
1905 delinquent in providing access to justice to its poor and middle
1906 class?

1907 The Furman case is significant because it addresses the
1908 calculus of self-regulation. The organized bar cannot claim the
1909 power of self-regulation in the name of public interest unless the
1910 system operates to provide justice to all citizens. The power
1911 given to the organized bar cannot be used to protect the privileges
1912 of lawyers unless and until those privileges can be shown to
1913 benefit the public. Furman provides a stark example. If legal
1914 secretaries and paralegals are to be prevented from providing
1915 services to citizens who need those services, the bar must be
1916 responsible for seeing that those services are, indeed, provided.

1917 We know that legal services are not available to the
1918 poor. This problem is both quantitative and qualitative, for, as
1919 Robert Kennedy noted, "Rarely, if ever, do the best lawyers and the
1920 best law firms work with the legal problems that beset the most

deprived segments of our society There remain whole areas of the law where no more than a handful of lawyers go to assist those most in need of legal help."¹⁰⁷ Three decades after Robert Kennedy said these words, we have begun new legal service organizations, developed new sources of funding and generated a great deal of rhetoric, but -- the sad truth is -- things haven't changed very much.

In 1989, the American Bar Association reported the "National Survey of the Civil Legal Needs of the Poor"¹⁰⁸ and the problems experienced by people living in households at or below 125% of poverty. It found that almost 40% of the nationwide sample had a civil legal problem for which they did not have legal assistance in the previous year. Some of the problems identified (i.e., access to medical treatment) can be addressed by new programs to modify the delivery system, but many of the problems identified can only be resolved in our system through the legal process and lawyers are necessary for much of that process.

It is not just the poor people of this country who do not have access to justice. The most intractable problem is that of

¹⁰⁷ [Kennedy quote.]

¹⁰⁸ American Bar Association Consortium on Legal Services and the Public, Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and the Public Generally (ABA, 1989).

1944 providing legal services to the middle class. When President Jimmy
1945 Carter decided to attack lawyers, he (unlike Dan Quayle) at least
1946 got his facts almost straight. His criticism that 90% of all
1947 lawyers represent 10% of the people was pretty close to the mark.

1948 I frequently think about this problem in very personal
1949 terms. In speeches to bar associations, I have frequently asked
1950 lawyers this very personal question: If you had a legal problem,
1951 could you afford to hire yourself? If any lawyer answers in the
1952 affirmative, I know that their work is plaintiffs' personal injury
1953 (for a contingent fee) or legal services to the poor.

1954 What can be done about this problem of justice for the
1955 middle class? To be honest, I do not know the answer and I can
1956 only suggest, very tentatively, that increased lawyer population
1957 and technology may point a way. Now that computers provide easy
1958 access to all our libraries and allow lawyers to do clerical work,
1959 there is every reason to believe that the idea of the neighborhood
1960 lawyer will develop over time.

1961 Those ubiquitous management experts who are so eager to
1962 make us more efficient and business-like often say that law is the
1963 last of the cottage industries and perhaps we should think of that
1964 concept, not as a fault but as a concept for approaching the
1965 problem of legal services to middle class Americans.

1966 Lawyers who work out of their homes or in inexpensive
1967 offices, tied into a network of other lawyers, including
1968 specialists, by computers could provide very high quality legal
1969 service. To bring this about someone must develop the network of
1970 computer services and recruit the first group of lawyers, but it
1971 should be relatively easy to develop a model which allows lawyers
1972 to operate in a very low overhead environment close in to the
1973 communities they serve.

1974 Attorney General Janet Reno has proposed that there be a
1975 new level of legal service provided by people who are required to
1976 have an undergraduate degree with a specialty in legal services and
1977 who are more accessible to the public for simple legal tasks. She
1978 contemplates that they will be located in the community or even
1979 that they would be mobile, serving from vans.¹⁰⁹

1980 Of course, there are many other ideas, including the
1981 modernization of lawyer referral programs, delivery of legal
1982 services through large retail chains, prepaid legal services, the
1983 training and licensing of paralegals, the expansion of citizen
1984 mediator programs, to name a few, but none holds as much promise
1985 and attraction as the return to law as a cottage industry. The
1986 ABA, the state bar associations and bar foundations should try to

1987 ¹⁰⁹ Janet Reno speech to American Law Institute, Washington,
1988 D.C., May 14, 1993.

1989 develop this idea.

1990 But the first priority ought to be where the problem is
1991 greatest: Access to justice for the people who are most in need,
1992 the people who have already been singled out as a special class by
1993 the judges who approved the lawyers' oath which calls on lawyers to
1994 serve the "defenseless and oppressed."

1995 We need to understand that in this society, so rich with
1996 lawyers (and lawyers' rhetoric), we have failed to provide legal
1997 services to the poor and that we do not compare well with other
1998 countries. Justice Earl Johnson, Jr. has written a comparative
1999 study which illustrates how badly the United States lags behind
2000 other countries in the provision of legal services:¹¹⁰

2001 When it comes to the legal entitlement to free
2002 counsel for indigent civil litigants, the
2003 United States is in a distinct minority among
2004 the industrial democracies of the world.¹¹¹

2005 In language which reminds me of Dr. Lundberg's editorial,

2006 ¹¹⁰ Earl Johnson, Jr., "The Right to Counsel in Civil Cases:
2007 An International Perspective," 19 Loy. L.R. 341, (1985).

2008 ¹¹¹ Id. at 345.

Justice Johnson observes that South Africa is about the only industrialized noncommunist country other than the United States which still does not have a constitutional or statutory right to counsel in civil cases.¹¹²

Justice Johnson also points to a revealing historic fact for those who treasure the tradition of English law -- a 1495 statute adopted in the days of Henry VII provided for lawyers and judges to serve the poor.¹¹³ That statute states (in modern English):

That every poor person ... which ... shall have cause of action ... against any person ... within this realm shall have by the discretion of the Chancellor of this realm ... writ or writs original and writs of subpoena ... therefore nothing paying to your highness for the seals of the same, nor to any person for the writing of the same writ and writs to be hereafter sued; and that the said chancellor ... shall assign such of the clerks which shall do and use the making and writing

¹¹² Id.

¹¹³ Id. at 342.

2031 of the same writs, to write the same ready to
2032 be sealed, and also learned Counsel and
2033 Attorneys for the same, without any reward
2034 taken therefore: And after the said writ or
2035 writs be returned, ... the Justices there
2036 shall assign to the same poor person or
2037 persons, counsel learned, by their
2038 discretions, which shall give their Counsels,
2039 nothing taking for the same: And likewise the
2040 Justices shall appoint Attorney ... for the
2041 same poor person ..., and all other officers
2042 requisite and necessary to be had for the
2043 speed of the said suits to be had and made,
2044 which shall do their duties without any reward
2045 for their counsels, help, and business in the
2046 same. ...¹¹⁴

2047 This statute, a part of the statutes and common law of
2048 Britain on July 4, 1776, has been adopted by many states which have
2049 adoption statutes similar to that of Section 2.01, Florida Statutes
2050 (1991):

2051 The common and statute laws of England

2052 ¹¹⁴ Statutes of Henry VII, 1495, 11 Hen. 7, c12, Volume III,
2053 Florida Statutes 1941, pp. 51, 52.

which are of a general and not a local nature,
with the exceptions hereinafter mentioned,
down to the fourth day of July, 1776, are
declared to be of force in this state;
provided, the said statutes and common law be
not inconsistent with the constitution and
laws of the United States and the acts of the
legislature of this state.

The curious thing about the ancient English statute is
that most Americans believe that there is a right to counsel in
civil cases. A September 1991 survey by the American Bar
Association and West Publishing Company reported that seven out of
ten Americans believe that poor Americans have a guaranteed right
to counsel in civil cases.¹¹⁵ But there is no such right and the
reality is far from the ideal expressed in our pledge of
allegiance: "one nation . . . with liberty and justice for all."

Leaders of the organized bar have been forging a steady
effort to achieve equal access to justice in this country since the

¹¹⁵ Earl Johnson, Jr., Equal Justice in This Century: What
the American Bar Association Can Do to Make Access to Justice a
Reality for the Common Citizen Before the End of the Twentieth
Century [Confidential Draft] 1 (September 15, 1991) (not formally
published, on file with Talbot D'Alemberte) (citing Bar Survey
Reveals Widespread Legal Illiteracy, 11 California Lawyer 68 (June,
1991)).

beginning of this century. In the 1920 American Bar Association convention, Charles Evans Hughes issued a call to lawyers:

The legal profession owes it to itself that wrongs do not go without a remedy because the injured has no advocate. ... Does the lawyer ask, who is my neighbor? I answer -- the poor man deprived of his just dues.¹¹⁶

Reginald Huber Smith, the great advocate of legal services to the poor, spoke at that same convention and asked the ABA to declare "here and now that henceforth within the field of law the mighty power of the organized American Bar stands pledged to champion the rights of the poor, the weak, and the defenseless."¹¹⁷ This convention established the ABA Standing Committee on Legal Aid and Indigent Defendants with Charles Evans Hughes as its first chair.¹¹⁸

The interest of the ABA continued over the years,¹¹⁹ and

¹¹⁶ Id. at 4.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ For example, in 1951, Harrison Tweed exhorted lawyers and the public: "Every lawyer and every layman should help with mind and money, heart and soul, until the objective of justice for all has been attained. Then, but not until then, we can all go

a major watershed was reached through the 1965 endorsement of federal funding for legal services achieved under the leadership of then ABA President Lewis Powell.¹²⁰ Justice Earl Johnson observes that this endorsement was an acknowledgement that the goal of "justice for all" is a pledge taken by all citizens and that it was therefore a responsibility of society.¹²¹ It was also a recognition that charitable endeavors could not achieve the goal of full access.

Since 1965, the organized bar has been steadfast in the effort to support legal services programs. Federally funded programs have been defended during the mean-spirited attacks by the Reagan administration and the bar has spent considerable energy expanding voluntary pro bono programs and developing additional sources of funding, notably the program to capture the interest on lawyers' trust accounts for public service programs.¹²²

The resources available to provide legal services to the poor are greater than in 1965, but despite the initiatives which

fishing." Id. at 5.

¹²⁰ Id.

¹²¹ Id.

¹²² I am proud to claim the principal founder of this program, Arthur England, as my friend and former partner, and proud that my law partners at Steel Hector & Davis helped to develop this idea in the courts and administrative agencies.

2126 have established over 700 voluntary pro bono programs, recruited
2127 many of the largest law firms into a public service compact,
2128 identified new private and public resources and supported federal
2129 funding for legal services programs, all surveys of legal needs of
2130 the poor show that at least 80% of these needs are not being met.
2131 This statistic is rather cold, and it does not convey the essence
2132 of the problem which confronts a poor citizen whose existence is
2133 frequently bound by laws and regulations and whose family
2134 relationships are controlled by law.

2135 Through what avenues will lawyers achieve their special
2136 mission to assure justice and lead society to redeem its pledge?
2137 Justice Earl Johnson has suggested that there are seven rationales
2138 for equal justice:

2139 1. The right to counsel which existed under the common
2140 law.¹²³ This approach relies in part on the Statute of Henry VII
2141 enacted in 1495 and on the tradition of court appointments.¹²⁴
2142 Justice Johnson notes that though the English statute expressly
2143 provides for free counsel and has been adopted in most American
2144 jurisdictions as part of the statute and case law of England as it
2145 existed on July 4, 1776, no court has applied this statute to

2146 ¹²³ Johnson, supra note ____, *, at 9.

2147 ¹²⁴ Id.

2148 provide for access.¹²⁵

2149 2. Constitutional due process which requires that there
2150 be a fair hearing.¹²⁶

2151 3. Constitutional equal protection principles which
2152 under Justice Johnson's formulation would be construed to state
2153 "that citizens are guaranteed not only that the substance of the
2154 laws will treat them equally, but that they will have an equal
2155 chance to protect themselves through those equal laws."¹²⁷

2156 4. "The right to counsel as part of a 'right to
2157 justice' under 'social contract' theory."¹²⁸ Justice Johnson puts
2158 forward this rationale as an amalgam of the rights -- due process,
2159 equal protection, etc. -- which make up the bargain between the
2160 citizen and the state, a bargain which offers the citizen a "right
2161 to equal justice."¹²⁹ Government has options for it can "either
2162 simplify the forums -- drastically -- or provide lawyers to those

2163 ¹²⁵ Id. at 10.

2164 ¹²⁶ Id.

2165 ¹²⁷ Id. at 11.

2166 ¹²⁸ Id. at 12.

2167 ¹²⁹ Id.

2168 who can't afford them."¹³⁰

2169 5. "The right to counsel as an essential of the
2170 fundamental right to a 'fair hearing' ..." ¹³¹ This rationale,
2171 which at first appears to overlay the concept of due process is, in
2172 thrust, quite close to due process but it has taken on special
2173 significance because it is derived from law developed in
2174 Europe.¹³² Justice Johnson observes that, in 1979, the European
2175 Court of Human Rights interpreted the "fair hearing" guarantee of
2176 the European Convention of Human Rights to require that counsel be
2177 appointed free of charge to poor litigants in civil cases in
2178 regular courts.¹³³

2179 6. "The right to counsel as an essential partner of the
2180 right to vote for citizens of a democracy..." ¹³⁴ In this
2181 rationale, Justice Johnson argues that "the right to vote doesn't
2182 mean much without the ability to enforce the rights your vote has
2183 won you."¹³⁵ This point is illustrated by referring to rights

2184 ¹³⁰ Id.

2185 ¹³¹ Id.

2186 ¹³² Id. at 13.

2187 ¹³³ Id.

2188 ¹³⁴ Id.

2189 ¹³⁵ Id.

2190 obtained by farmworkers who gained those rights in the political
2191 process.¹³⁶ Unless those rights can be enforced, they are hollow
2192 rights.

2193 7. The ethical obligation of the bar.¹³⁷

2194 * * *

2195 Each of these seven points of view provide a basis for
2196 providing full access to justice. Since it is the essence of the
2197 law profession's bargain with society that access will be provided,
2198 two of these theories -- the first and last ones -- strike me as
2199 very compelling reasons for the organized bar to play a special
2200 role. As I have indicated in Chapter 3, "Professing," I believe
2201 that lawyers have already entered into an oath which obligates them
2202 to see that justice is done (rationale 7) and they have entered a
2203 profession where the tradition of lawyer service to the poor is
2204 centuries old (rationale 1).

2205 Before moving to the next chapter and a closer
2206 examination of these points, I want to pause and put another piece
2207 of Justice Johnson's thesis in place. The special obligation of

2208 ¹³⁶ Id. at 14.

2209 ¹³⁷ Id.

lawyers is to see that justice is accessible, but it is not necessary that lawyers take on this job alone. Lawyers have a special franchise from society in providing access to justice, but law reform leading to simplified procedures, use of alternative dispute resolution mechanisms and non-lawyer facilitators may lead to access to justice without lawyers. Moreover, lawyers can discharge their duty by providing resources and helping to see that others provide resources for legal services to the poor.

In fact, anyone who has studied the problem understands that lawyers can not fill the gap by acting alone. As Justice Johnson has said, "the road to equal justice has more than one lane."¹³⁸

If lawyers will accept the justice mission as their special obligation, the starting point for me is to assume that those institutions responsible to the public -- the organized bar and the judiciary -- do everything that can reasonably be done to see that lawyers, all lawyers, are called on to fulfill their oath. That takes me to Judge Taylor.

¹³⁸ Id. at 17.

2229

Chapter Five

2230

CALLING THE ROLL:

2231

JUDGE TAYLOR AND COMPREHENSIVE LAWYER PUBLIC SERVICE

2232

2233

When we were a less complicated society, lawyers were in

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fairly direct contact with the poor and it was common to provide

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legal services to the poor. I have no confirming empirical

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evidence of this except my own experience. My father was a lawyer

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and for years he enjoyed introducing himself as the President of

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the Chattahoochee Bar Association, a title no one contested, for he

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was the only lawyer in that town. Before my father began his

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practice, there was no lawyer in town. After his death, no one

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established a practice for several years. Perhaps there is

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something to the old saying about there not being enough work for

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one lawyer, but plenty of work for two lawyers to prosper. There

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was never a second lawyer in this town and my father's practice

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never really prospered, but he loved his life.

2246

In daily life, my father merely served clients. He never

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discussed pro bono work and I doubt that the concept of pro bono

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intruded very much on his thoughts. He did have one category of

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cases for which he would never accept payment -- adoption cases --

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but for many of the matters he handled, Dad knew that clients could

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not pay, yet he served them all. In looking over his estate files

2252

after he died, I realized that few people really paid him for legal

2253 services. That is to say, few paid him money. Many gave him
2254 something of economic value -- a country ham, credit at the
2255 hardware store, free gas and haircuts. Virtually everyone gave him
2256 appreciation. My father loved being a lawyer.

2257 I have often wondered how many rules my father must have
2258 violated in his practice. I doubt that he reported the barter
2259 aspects of his income to the IRS, and indeed, he had no real barter
2260 arrangement because he didn't keep accounts. People just thanked
2261 him by giving him gifts, determining for themselves when they had
2262 left enough hampers of vegetables on the back porch steps. He
2263 certainly violated ethics rules when he met with both husband and
2264 wife to discuss their divorce and when he settled disputes between
2265 the person who came to him and the client's antagonist without
2266 benefit of other counsel or a judge. My father was annoyed when I
2267 questioned these practices. "These clients can't afford your brand
2268 of justice," he would tell me and close the conversation. He was
2269 right.

2270 It is probably because of my father that I take the story
2271 of Atticus Finch so seriously. In the book, To Kill A
2272 Mockingbird,¹³⁹ and the film in which Gregory Peck plays Atticus,
2273 we see the small town lawyer portrayed in heroic form and it is

2274 ¹³⁹ Harper Lee, To Kill a Mocking Bird (Warner Books, 1960).

2275 from Atticus Finch and his experience that lawyers can derive the
2276 model for a program of comprehensive public service.¹⁴⁰

2277 At a time when law school applicants tell us they are
2278 drawn to our profession from watching "LA Law," Atticus is an
2279 anachronism. He did not have fast cars or expensive clothes. He
2280 was a small town lawyer, a widower who lived in a simple, wooden
2281 frame house and provided legal services to the people of his
2282 community. They often paid for his service in hickory nuts and
2283 collard greens.

2284 I particularly want to focus on that scene when the local
2285 judge, Judge Taylor, asks Atticus Finch to serve as appointed
2286 counsel for a black man accused of raping a white woman. In the
2287 movie, it was an evening, after the children were in bed and
2288 Atticus was on his front porch, that the judge came to visit and
2289 asked Atticus to defend Tom Robinson:

2290 ¹⁴⁰ Even Atticus Finch is not above criticism. Professor
2291 Monroe Freedman attacks him for not objecting to the racist society
2292 in which he lived in fictional McComb, Alabama, in the year 1932.
2293 Monroe Freedman, "Atticus Finch, Esq., R.I.P.," Legal Times, Feb.
2294 24, 1992, p. 20, and "Finch: The Lawyer Mythologized," Legal
2295 Times, May 18, 1992, p. 25. David Margolick, "Chipping at Atticus
2296 Finch's Pedestal," N.Y. Times, Feb. 28, 1992, at B1.

2297 A different view of Atticus Finch is presented by Thomas
2298 L. Shaffer, "The Moral Theology of Atticus Finch," 42 U. Pittsburgh
2299 L.R. 181 (1981).

2300 J: Evnin' Atticus.

2301 A: Howdy...Judge. Kinda warm, isn't it?

2302 J: Yes. Indeed.

2303 A: How's Mrs. Taylor?

2304 J: She's fine. Fine, thank you. Atticus,
2305 you heard about Tom Robinson?

2306 A: Yes sir.

2307 J: Grand Jury'll get around to chargin' him
2308 tomorrow. I uh...I was thinking about
2309 appointing you to take his case. Now I
2310 realize you are very busy these days with
2311 your practice...and your children need a
2312 great deal of your time.

2313 A: Yes sir. (long pause) I'll take the
2314 case.

2315 Atticus was asked to take the case, paused, thought on it for a few
2316 seconds and accepted. We all know the story from there.

2317 Atticus Finch was not the only hero in To Kill a
2318 Mockingbird. Judge Taylor was in the tradition of common law
2319 judges who recognized the need to provide counsel and who exercised
2320 his authority to appoint counsel from the ranks of the Bar.
2321 Atticus did not volunteer -- he accepted out of a belief in the
2322 tradition that a lawyer is obligated to accept an appointment from
2323 the bench and obligated to help the poor person who seeks justice.

2324 The Atticus Finch/Judge Taylor model is fairly simple and
2325 provides the very mechanism we ought to inject into the pro bono
2326 debate today. If lawyers acting under the direction of judges are
2327 told that there is a need, then lawyers who take their oaths
2328 seriously should be prepared to accept court appointments.

2329 This model may be useful to lawyers as they face up to
2330 the question of what duty members of this "public profession" have
2331 to render public service. Across the country, judges and bar
2332 associations are taking the initiative to expand legal services by
2333 establishing pro bono programs suited to the unique needs and
2334 resources of their communities. This movement has involved many
2335 programs (over 700) in many communities, and has involved an
2336 increasing number of lawyers. Sadly, it is very rare to find that
2337 more than 15 to 20% of lawyers in any community play any role in
2338 direct legal services to the poor. Lawyers today are not serving
2339 as the "connecting link."

2340 Since at least 1983, when the ABA debate on its model
2341 ethical rules took place, the movement toward formal pro bono
2342 organizations has been coupled with a lively debate on the question
2343 of whether lawyers should undertake more than a professed duty to
2344 provide public service. There has been considerable dispute
2345 concerning rules of mandatory pro bono, including the power of
2346 court appointment.

2347 The debate on this subject has been heated and even
2348 acrimonious. The proponents of mandatory pro bono point out that
2349 the lawyer's ethical code abandons the mandatory "shall" and
2350 substitutes the precatory "should" when it addresses lawyer public
2351 service and argue that lawyers should be required to live up to
2352 their oaths.

2353 I divide the opponents of mandatory pro bono into two
2354 broad groups, recognizing that there is much overlap. The first
2355 group, the pragmatists -- I classify myself as part of this group -
2356 - argue that injecting pro bono requirements into the system of
2357 ethical obligations necessarily involves a fragile disciplinary
2358 system, and they recoil from the idea that a lawyer will be
2359 prosecuted for failure to provide public service. I fear that the
2360 problem of defining pro bono service is more difficult when the

2361 context is the general duty of service¹⁴¹ and I worry about the
2362 quality of service when the attorney-client relationship is
2363 mandated.

2364 Other opponents of mandatory pro bono do not linger much
2365 on the practical details of such a proposal, but place their
2366 opposition on large principles. These opponents argue that
2367 important legal doctrines prohibit the court from requiring pro
2368 bono service, and that mandatory pro bono would be an imposition of
2369 slavery in violation of the Thirteenth Amendment; a deprivation of
2370 property without due process of law and a violation of the doctrine
2371 of equal protection.

2372 A vast potential for hostility exists in these opposing
2373 arguments. The proponents of mandatory pro bono seem to be chiding
2374 the rest of the bar about its failure to live up to the principles
2375 of the profession, while the opponents are charging, among other
2376 things, an intent to enslave lawyers.¹⁴²

2377 ¹⁴¹ The problems of defining pro bono are legion, but many
2378 relate to the question of whether "good works" (bar association
2379 work, civic groups, churches) should fall within the definition.

2380 ¹⁴² See, e.g., Robert W. Dogget, "Mandatory Pro Bono, the
2381 Case For," and Thelma E. Sanders Clardy, "Mandatory Pro Bono, the
2382 Case Against," Dallas Bar Association Headnotes, March, 1991, at 3;
2383 Charles Herring, Jr., "A Response to the Pro Bono Critics," Texas
2384 Lawyer, September 24, 1990, at 2; Michael J. Mazzone, "Mandatory
2385 Pro Bono: Slavery in Disguise," Texas Lawyer, October 22, 1990, at
2386 22.

2387 In recent years, federal courts in at least six districts
2388 have adopted local rules allowing courts to appoint lawyers,
2389 without pay, to represent indigents in civil cases.¹⁴³ In
2390 Arkansas federal courts, lawyers who can document 20 hours of pro
2391 bono service in the previous 12 months can be exempted from such an
2392 appointment.¹⁴⁴

2393 In November 1991, the Texas Sunset Advisory Commission
2394 recommended legislation to renew the state bar's authority to
2395 discipline lawyers -- but also directed the bar to develop a
2396 mandatory pro bono program within two years. That did not go far
2397 enough for a group of Texas lawyers who filed a class-action suit
2398 to require the Texas Bar Association to establish a mandatory pro
2399 bono for all Texas lawyers. They cited the open courts and
2400 immunities and privileges provisions of the Texas constitution --
2401 contrasting that with the Bar's own finding that 90 percent of
2402 legal needs of Texas poor people go unmet. They asked for a jury
2403 trial, and one lawyer for the plaintiffs said, "The trigger for the
2404 law suit was the decision of the bar to stonewall reform." This
2405 case was dismissed, the dismissal appealed and the rather shrill

2406 ¹⁴³ Charles Herring, Jr., "Isn't it Time for Mandatory Pro
2407 Bono?; Plan Would Help Bar's Image -- and Meet Needs of the Poor,"
2408 Texas Lawyer, August 13, 1990, at 18, (citing Carlson, District
2409 Court Pro Bono Programs, PBI Exchange (ABA newsletter),
2410 Winter/Spring, 1989.

2411 ¹⁴⁴ Id.

2412 debate continued.

2413 In Maryland, the Supreme Court has stated that it will
2414 consider mandatory pro bono, and similar efforts are underway in
2415 various stages in Hawaii, North Dakota, and New York.¹⁴⁵ The
2416 Chief Judge of New York's highest court gave notice to the New York
2417 State Bar to consider the pro bono performance of lawyers, stating
2418 that if the New York Bar did not adopt a comprehensive plan to
2419 provide free legal services to the poor by 1992, the Chief Judge
2420 would propose a court mandated twenty-hour-per-year pro bono
2421 requirement.¹⁴⁶

2422 In short, there is a rising awareness that lawyers have
2423 failed to meet both individual and collective responsibilities to
2424 serve public needs. And behind that activity is increased pressure
2425 from outside to make us take those responsibilities more seriously.

2426 Surveys of legal needs of the poor¹⁴⁷ and attorney

2427 ¹⁴⁵ Herring, supra, note ____* at ?.

2428 ¹⁴⁶ Id. Some time before he had difficulty with the law,
2429 Chief Judge Sol Wachtler indicated his satisfaction with the
2430 progress made.

2431 ¹⁴⁷ See, e.g., The Alabama State Bar, et al., Alabama Legal
2432 Needs Survey (October, 1989); The Illinois State Bar Association,
2433 et al., Illinois Legal Needs Study: Plan for Action (July, 1989);
2434 The Maine Commission on Legal Needs, Report of the Maine Commission
2435 of Legal Needs -- 1990 (May, 1990); The Advisory Council of the
2436 Maryland Legal Services Corporation, Action Plan for Legal Services

surveys¹⁴⁸ provide rather consistent data which demonstrate that most lawyers are not doing pro bono work to serve the legal needs of the poor.¹⁴⁹ As a profession, we know there is great need, that lawyers are not doing much to fill this need and that pressure is growing from the public to see that there is access to justice.

The debate on this subject to date has been largely between those who argue for mandatory pro bono and those who support voluntary pro bono.¹⁵⁰ As we have observed, it has been an acrimonious debate.

I do not like mandatory pro bono. I've never liked it and never supported it. I do not want to force lawyers to serve when they are unwilling to serve, and I don't want to burden the discipline system with prosecutions of those people who do not have enough pride in their profession or in the integrity of their own oath. I do believe, however, in a comprehensive system under which

to Maryland's Poor (January, 1988); The Massachusetts Legal Assistance Corporation, Massachusetts Legal Services Plan for Action (November, 1987); The New York State Bar Association, New York Legal Needs Study: Draft Final Report (October, 1989).

¹⁴⁸ See, e.g., ABA Young Lawyers Division, The State of the Legal Profession -- 1990 [Pre-Publication Draft] (1990).

¹⁴⁹ I believe that the overwhelming majority of lawyers do some pro bono work, depending a bit on how "pro bono" is defined. But my specific focus here is on direct legal service to the poor.

¹⁵⁰ See, e.g., Dogget and Clardy, supra note __*, at 3.

2462 all lawyers are offered the opportunity to serve. If they decline
2463 to fulfill their oaths, and decline publicly, then that is enough
2464 coercion for my tastes.

2465 There is evidence that lawyers really want to be called
2466 to service and will respond. Voluntary bar associations operating
2467 in two Florida cities -- Tallahassee and Orlando -- have long had
2468 rules requiring their members to participate in legal aid work or
2469 (in the case of Orlando) to provide direct financial support for
2470 legal services to the poor. If you were to look for the bar
2471 associations which seem most vigorous and active, Orlando would
2472 clearly top the large urban bar associations and Tallahassee would
2473 lead in the smaller and mid-size communities. This may be a
2474 coincidence, but I do not think so. I believe that lawyers in
2475 these communities have developed a culture of service which makes
2476 them think about their profession in a different way.

2477 There is other evidence. One of the more remarkable
2478 lessons I learned during the time that I served as ABA President
2479 was the extraordinary reservoir of energy which is represented by
2480 the American lawyers' cultural disposition towards doing good
2481 works. In early 1990, I worked with several other lawyers to
2482 develop a program for technical assistance in legal matters for the
2483 emerging democracies of Central and Eastern Europe. The program,
2484 called the Central and East European Law Initiative ("CEELI"), was

2485 designed to draw in volunteer lawyers, some for as much as a full
2486 year of their time, to work on projects designated by the client
2487 countries through their practicing and academic lawyers, judges and
2488 public officials. This project brought forth an enormous response
2489 from American lawyers who gave freely of their time and resources.
2490 Quite early in our efforts, we realized that this program of
2491 technical assistance could be significantly improved by the
2492 involvement of Western European lawyers since many of the projects
2493 on which we were working were designed to help integrate the law of
2494 the client country into the mainstream of Western European law.

2495 We sought to engage lawyers from Western Europe in our
2496 project, but we were frustrated in this effort. The typical
2497 response of West European lawyers, including the bar leaders, was
2498 that they would be happy to help develop our project and to assist
2499 so long as there would be payment for their services. It quickly
2500 became clear that the idea of voluntary pro bono effort for law
2501 reform was not nearly so much a part of the culture of West
2502 European lawyers and their bar associations as it is for Americans.

2503 It may be too much to extrapolate from this experience
2504 and reach a conclusion that lawyers in the United States have a
2505 very special and commendable culture, but I believe that it is very
2506 creditable evidence of the unique culture of public service
2507 embraced by American lawyers.

2508 Lawyers cannot expect to retain the right to provide
2509 exclusive services over a broad range of functions in our legal
2510 system unless they can demonstrate that these services are
2511 available to everyone, regardless of their ability to pay. If
2512 lawyers are to renew their role as the "connecting link" in our
2513 society, the role of lawyers which de Tocqueville observed but
2514 which is so diminished today, lawyers must think of ways to
2515 reconnect with the problems of the community.

2516 The question involves the very soul of the profession --
2517 and lawyers' ability to retain the public franchise as well. It
2518 calls on lawyers to expand greatly their pro bono activities.

2519 Rising to the occasion, establishing comprehensive pro
2520 bono programs in every state, would be a major step by the
2521 profession to vindicate those who believe that being a lawyer is a
2522 special trust, a special responsibility and a special honor -- not
2523 simply a business.

2524 As Chief Justice William Howard Taft wrote in 1926,
2525 "[s]omething must be devised by which everyone, however lowly and
2526 however poor, however unable by his means to employ a lawyer and to
2527 pay court costs, shall be furnished the opportunity to set fixed

2528 machinery of justice going."¹⁵¹ Devising that "something" is up
2529 to lawyers.

2530 The approach to this problem which I propose is that we
2531 adopt the English method within the old maxim that, "in order to
2532 reach the truth, the Germans add, the French subtract and the
2533 English change the subject." We should not become mired in the
2534 divisive debate between advocates of mandatory versus voluntary pro
2535 bono.¹⁵² Instead, we should move away from a discussion about the
2536 scope of disciplinary rules and codes of conduct to control public
2537 service and return to the model of Atticus Finch and Judge Taylor.

2538 At the risk of being parochial, I want to talk about my
2539 home state, Florida, because much of the story I want to tell can
2540 be told by reference to events in Florida. Florida has had a
2541 destiny as the special venue for many of the access to justice and
2542 right to counsel cases, beginning at least 30 years ago, when
2543 Clarence Gideon -- a simple, troubled man -- rose and said to the
2544 judge, "The United States Supreme Court says I am entitled to be

2545 ¹⁵¹ **[Need Source.]**

2546 ¹⁵² Indeed, we can leave the field agreeing that both sides
2547 may be right. Voluntary pro bono has not worked all that well,
2548 despite some successes in a few jurisdictions, but there is good
2549 reason to doubt that mandatory will work very well, either.

2550 represented by counsel."¹⁵³ At the time, Clarence Gideon was not
2551 correct, and over 5,000 people were in Florida prisons who had been
2552 convicted without benefit of counsel.¹⁵⁴

2553 In 1963, the Court ruled with Clarence Gideon and
2554 established this right which Gideon had prematurely announced.¹⁵⁵
2555 Thereafter, the state was required to furnish counsel to defendants
2556 accused of felonies. Later this principle was extended to most
2557 misdemeanors and to some other activities of the state.¹⁵⁶

2558 One of the curious consequences of Gideon and its progeny
2559 is the decreased burden on lawyers in private practice and the
2560 attenuated connection between lawyers and their communities. We
2561 accept as routine today a system of publicly-funded public
2562 defenders to represent the defendants in criminal cases who are
2563 unable to represent themselves, yet, before Gideon, lawyers were
2564 routinely appointed to defend poor defendants in many

2565 ¹⁵³ Gideon v. Wainwright, 372 U.S. 335 (1963). See also
2566 Anthony Lewis, Gideon's Trumpet 10 (Vintage Books ed., Random
2567 House, 1989) (1964).

2568 ¹⁵⁴ Lewis, supra note __*, at 158.

2569 ¹⁵⁵ Gideon v. Wainwright, 372 U.S. 335 (1963).

2570 ¹⁵⁶ See Argensinger v. Hamlin, 407 U.S. 25 (1972). This
2571 landmark case established the right to counsel for defendants
2572 charged with misdemeanors, where there was the possibility of
2573 imprisonment or a substantial fine.

jurisdictions.¹⁵⁷ The constitutionalization of the right to counsel in criminal cases relieved lawyers from this representation by creating a governmental duty to provide for this right.

Civil access questions have also been raised in Florida. I've already referred to the Rosemary Furman case, in which the Florida Supreme Court held that it was the responsibility of The Florida Bar and the Florida Supreme Court to assure access to justice,¹⁵⁸ but the most significant decision for civil access was made in a rule proceeding where the Florida Supreme Court inaugurated in the United States the Interest on Lawyers' Trust Account ("IOLTA") program. Established in 1981, this program has helped greatly to fund legal services programs.¹⁵⁹ It has been adopted by all states (and the District of Columbia) except Indiana and the annual revenue for public service and access exceeds one hundred million dollars. The IOLTA program helped fill the gaps created by the shortfalls in federal funding during the Reagan/Bush years, but it did not solve the problem of access nor deal with the lawyers' public service obligation. The IOLTA program, after all,

¹⁵⁷ There were, of course, some jurisdictions, including some circuits in Florida, which had established public defender systems prior to Gideon.

¹⁵⁸ See supra, pp. ____.

¹⁵⁹ See In re Interest on Trust Accounts, 356 So.2d 799 (Fla. 1978) (approving IOLTA program); In re Interest on Trust Accounts, 402 So.2d 389 (Fla., 1981) (implementing IOLTA program).

2599 was designed to derive resources not from lawyers' contributions
2600 but from the accounts where clients' money was deposited.

2601 The issue of the lawyers' role in providing access has
2602 been vigorously debated in Florida as elsewhere. In In re
2603 Emergency Delivery of Legal Services to the Poor,¹⁶⁰ a formal
2604 petition seeking to establish a mandatory pro bono program was put
2605 before the Florida Supreme Court and rejected in 1983. The opinion
2606 noted that there was a reluctance "to coerce involuntary servitude
2607 in all walks of life; we do not forcibly take property without just
2608 compensation; we do not mandate acts of charity."¹⁶¹

2609 Reading that language, it is easy to see why the opinion
2610 was so encouraging to the doctrinal opponents of compulsory pro
2611 bono, those who believe that legal doctrine prevents any court
2612 directed pro bono program. The other group of opponents to
2613 compulsory pro bono, the pragmatists (who resisted mandatory pro
2614 bono on the grounds that it was impractical to discipline lawyers
2615 for their failure to provide pro bono service), greeted the 1983
2616 decision with more ambivalence, recognizing that their victory over
2617 the advocates of a mandatory program left a vast need unfulfilled
2618 and left lawyers largely unengaged in solving the problem.

2619 ¹⁶⁰ 430 So.2d 39 (Fla. 1983).

2620 ¹⁶¹ Id. at 41.

2621 Out of this agony a group of Florida lawyers interested
2622 in reuniting the profession with the public came together to
2623 propose a different idea. The proposal did not have the practical
2624 problems of mandatory pro bono, yet still held out some prospect
2625 for involvement of lawyers.¹⁶² This group, composed of some
2626 lawyers who had supported mandatory and some who had opposed it,
2627 filed a petition with the Supreme Court of Florida asking that the
2628 court once again open up the issue and consider developing a
2629 "comprehensive" pro bono program operating through the traditional
2630 mechanism of court appointment.¹⁶³

2631 In December 1990, the court announced a preliminary
2632 opinion which held against the more extravagant arguments opposing
2633 lawyer pro bono service.¹⁶⁴ It held that lawyer service through
2634 court appointment is not slavery as the opponents had argued,¹⁶⁵
2635 not a taking of private property without due process of law,¹⁶⁶
2636 and not an unconstitutional exercise of the Court's power into an

2637 ¹⁶² See In re Amendments to Rules, 573 So.2d 800, 801 (Fla.
2638 1990) (listing the fifty-eight attorneys involved and succinctly
2639 summarizing their petition).

2640 ¹⁶³ Id.

2641 ¹⁶⁴ Id.

2642 ¹⁶⁵ Id. at 805.

2643 ¹⁶⁶ Id.

2644 area of "social welfare."¹⁶⁷

2645 The beginning point for the Court's discussion was the
2646 lawyers' oath -- the profession:

2647 When an individual is admitted to
2648 practice law in Florida, he or she becomes an
2649 officer of its courts upon taking an oath
2650 expressly adopted by this Court. The last
2651 sentence expressly states: "I will never
2652 reject, from any consideration personal to
2653 myself, the cause of the defenseless or
2654 oppressed..." ... This provision identifies
2655 one of the specific public responsibilities
2656 lawyers have as officers of the court.¹⁶⁸

2657 The oath-takers' obligation was traced in an earlier

2658 ¹⁶⁷ Id. at 805-06. The opponents to the petition also argued
2659 that a recent opinion of the United States Supreme Court prohibited
2660 uncompensated legal services on the basis of a lawyer's traditional
2661 professional obligation. The Florida court held that case, Mallard
2662 v. United States District Court, 490 U.S. 296 (1989), did not deal
2663 with the inherent power of the courts, but only with an
2664 interpretation of a specific federal statute. The Florida Court
2665 pointed to Barnard v. Thorstein, 489 U.S. 546 (1989), for authority
2666 of the court to require lawyer public service as a condition of
2667 practicing law. In re Amendments, 573 So.2d at 804.

2668 ¹⁶⁸ In re Amendments, 573 So.2d at 803 (emphasis original,
2669 footnote omitted).

Florida case in which the court noted the "common law obligation of the profession to represent the poor without compensation," and found that "one who is allowed the privilege to practice law accepts a professional obligation to defend the poor."¹⁶⁹ The Florida Supreme Court's 1990 opinion in In re Amendments developed this theme further, stating that the special nature of the common law adversary system made it essential that lawyers represent the defenseless and oppressed.¹⁷⁰

The Court's unanimous decision was that the legal doctrines advanced by the opponents were not an impediment to a court directed system of pro bono:

We hold that every lawyer of this state who is a member of The Florida Bar has an obligation to represent the poor when called upon by the courts and that each lawyer has agreed to that commitment when admitted to practice law in this state. Pro bono is a part of a lawyer's public responsibility as an officer of the court. ...¹⁷¹

¹⁶⁹ In the Interest of D.B., 385 So.2d 83, 92 (Fla. 1980).

¹⁷⁰ 573 So.2d at 804.

¹⁷¹ Id. at 806.

2692 The opinion concluded by drawing from Thomas Jefferson:

2693 Thomas Jefferson once said: "There is a debt
2694 of service due from every man to his country
2695 proportioned to the bounties which nature and
2696 fortune have measured to him." The lawyers of
2697 this state have recognized that they have a
2698 debt of service to the poor in the oath each
2699 took upon becoming a member of the legal
2700 profession and an officer of the courts. This
2701 important commitment assures a justice system
2702 for all. We acknowledge our responsibility to
2703 provide the necessary leadership to accomplish
2704 that goal.¹⁷²

2705 The court clearly identified both the duty of lawyers to
2706 serve and the duty of courts to lead the bar toward a system of
2707 public service which would allow lawyers to fulfill that duty.

2708 The Florida Supreme Court's 1990 decision in In re
2709 Amendments did not settle on the method for achieving this goal but
2710 it swept away the legal arguments against a program grounded on the
2711 appointment power. The opinion directed The Florida Bar/Florida

2712 ¹⁷² Id. at 806-07 (emphasis original, footnote omitted).

2713 Bar Foundation Joint Commission on the Delivery of Legal Services
2714 to the Indigent in Florida to submit a plan to the court.¹⁷³ The
2715 plan was to be a framework for the development of local access to
2716 justice programs. The court indicated its general agreement with
2717 the ideas that the chief judge of each circuit should play a role
2718 in developing local plans, since provision of legal services is "a
2719 community function which will vary from community to community
2720 based upon the needs and resources available."¹⁷⁴ The opinion
2721 envisions a statewide pro bono program formed by the network of
2722 programs in each judicial circuit.

2723 Earl Johnson, now a California appellate judge, formerly
2724 a leader of the legal services movement and widely regarded as one
2725 of the most thoughtful scholars of access to justice, has said to
2726 me the opinion is, "by far the best language on the Right to
2727 Counsel issue I have ever read in an opinion by an American court."

2728 The court withheld a determination of the precise form of
2729 the pro bono obligation until receiving and analyzing the report of
2730 The Florida Bar and Florida Bar Foundation Joint Commission on
2731 Delivery of Legal Services to the Indigent in Florida. That report
2732 called for a statewide standard for pro bono services to the poor -

2733 ¹⁷³ Id. at 806.

2734 ¹⁷⁴ Id.

2735 - a standard that each bar member provide at least twenty hours per
2736 year or make a financial contribution to an approved civil legal
2737 services agency.¹⁷⁵

2738 The Joint Commission defined pro bono services to mean
2739 not just "good works" but handling, without pay, civil matters for
2740 poor individuals, representing criminal defendants who are
2741 ineligible for public defender services, or performing activities
2742 related to the improved administration of justice or to the
2743 improvement of legal services for the poor. Under this plan,
2744 lawyers would certify to the Florida Bar each year whether they had
2745 or had not fulfilled the twenty-hour pro bono standard (or,
2746 alternatively, paid the "buy out"). The Joint Commission would
2747 also have the Florida Supreme Court, after two years, review the
2748 results and determine whether the plan should be continued, made
2749 mandatory or otherwise modified.

2750 On February 20, 1992, the Florida Supreme Court issued
2751 its opinion stating general agreement with this plan, adopting the
2752 twenty hour standard for each lawyer's service to the poor (with an

2753 ¹⁷⁵ The amount set by the Court was \$350.00. The ABA has
2754 adopted a standard of 50 hours for lawyers' voluntary services.
2755 These are not necessarily inconsistent, because the Joint
2756 Commission proposal is a focused requirement of 20 hours for the
2757 poor. The other hours can be public service activities other than
2758 legal services to the poor.

alternative contribution of \$350)¹⁷⁶ and directing the Joint Commission to develop a detailed plan. The definition of qualifying services is narrow so that the focus of the twenty hours requirement is on those most in need,¹⁷⁷ and the accountability of members of the bar will be achieved by requiring each lawyer to report to the Bar as to their participation in pro bono services to the poor.

The model in Florida was designed to move toward the goal of full access to justice. The court's opinions recognize that many elements must coalesce to achieve this access. In its December 1990 opinion, authored by Justice Ben Overton for a unanimous court, some of these many elements were recognized:

The poor's access to the legal system is an important factor that the commission will address. In order for this justice system to maintain credibility, we realize that it must be available and affordable to all segments of

¹⁷⁶ In Re Amendments to Rules, 598 So.2d 41 (Fla. 1992).

¹⁷⁷ The Court adopted the Joint Commission definition, which was, "(a) Handling without charge or expectation of a fee civil matters for persons with income at or below 125% of the federal poverty standard ... and handling without charge criminal matters for such persons in which there is no constitutional obligation to provide funds for representation; and (b) Free legal services to charitable, religious, civic and educational organizations in matters which are designed predominantly to address the needs of poor persons." Id. at 44.

society. Availability, not only for the poor, but also for those with limited funds, is another problem that merits the commission's consideration. This Court and The Florida Bar have regularly adopted programs to improve the accessibility of our judicial system. These include simplified proceedings in small claims court, probate, and dissolution of marriage matters; the development of simplified forms for a litigant's pro se use; the establishment of citizen dispute settlement centers; and the recent implementation of mediation and arbitration programs designed to resolve disputes in an efficient and economical manner. This Court has repeatedly recognized its responsibility to assure access to the courts.¹⁷⁸

In its decision approving the Joint Commission report, the Court again recognized that "[l]awyer pro bono representation is not the absolute solution to the problem of indigent representation," and that "a balance must be achieved between the government and the legal profession in providing this

¹⁷⁸ In re Amendments, 573 So.2d 806.

2809 representation." The Court even addressed an admonition:¹⁷⁹

2810 To the legislature, we emphasize that the
2811 legal profession is not able to single-
2812 handedly resolve the problem of indigent legal
2813 representation, and, although there is a
2814 budget crisis, funding will eventually have to
2815 be provided to address a significant portion
2816 of the needs identified by the Commission and
2817 particularly legal representation that is now
2818 mandated by the Constitution.

2819 The power of the opinion by Justice Overton was fortified
2820 by the dissent written by Justice Gerald Kogan, joined by Justice
2821 Rosemary Barkett. That opinion, supporting an immediate move to a
2822 mandatory pro bono rule, deserves extensive quotation:

2823 I agree with the majority opinion that
2824 there must be a reporting requirement even for
2825 voluntary pro bono services rendered by
2826 lawyers. I dissent, however, from the
2827 majority's failure to institute mandatory pro
2828 bono. The record before us today demonstrates

2829 ¹⁷⁹ 598 So.2d at 44.

2830 compelling reasons why such a requirement now
2831 must be created and enforced.

2832 In a very real sense, the present case
2833 involves many more people than just the
2834 privileged group of lawyers, legal scholars,
2835 and Bar officers who actually prepared and
2836 argued this cause. The people most seriously
2837 affected by this Court's actions today are
2838 precisely the ones who were not present -- the
2839 people who can least afford an attorney and
2840 thus can ill afford to appear before us to
2841 argue their side of this issue. These are the
2842 people that, because of the economic realities
2843 of our legal system, effectively have been
2844 excluded from the same level of legal services
2845 available to the more affluent residents of
2846 Florida.

2847 These dispossessed people are everywhere
2848 in our society. They include the abused,
2849 neglected, or abandoned children who too often
2850 become mere pawns of a legal process they
2851 certainly lack the skills to comprehend. They
2852 include the divorcing wife systematically

2853 denied a voice in a legal system that too
2854 often favors the divorcing husband's
2855 interests, because he too often is the one who
2856 holds the purse strings. They include the
2857 impoverished minorities unable to find legal
2858 representation because they are unable to pay
2859 even the most minimal fees charged by lawyers.
2860 They include the elderly on fixed incomes who
2861 cannot afford the cost of the legal services
2862 they need -- even simple services such as
2863 planning for illness or drafting a will. The
2864 dispossessed include the mentally and
2865 physically disabled, whose conditions often
2866 have stripped them of the wherewithal
2867 necessary to obtain legal advice. ...

2868 While the physical courthouse doors
2869 remain open, this ever-increasing complexity
2870 in the law now has figuratively slammed those
2871 doors in the face of countless Floridians.
2872 Only those who can afford an attorney or who
2873 themselves are lawyers truly have
2874 unconstrained access to the powers of the
2875 courts, which are supposed to belong to all
2876 the people of this state.

2877 The time has come for this state's Bar to
2878 place itself in the forefront of this nation's
2879 jurisdictions by fulfilling the mandate of the
2880 Florida Constitution. As attorneys, we too
2881 often are seen as a dour and greedy profession
2882 that enriches itself through legal subtleties
2883 we ourselves have created. In light of the
2884 highly publicized excesses of some of our
2885 members, it is all too easy for the public to
2886 forget that the complexity of the law
2887 primarily reflects the complexity of our
2888 present society.¹⁸⁰

2889 The Court did not go as far as the dissent suggested, but
2890 it is clear that Florida has embarked on an ambitious program to
2891 expand pro bono programs -- making it feasible for every attorney
2892 in the state to take part, or at least support, legal services for
2893 those who cannot afford them. But this effort to develop a
2894 comprehensive pro bono plan, one which "calls the roll" for all
2895 lawyers, should not be seen to solve the problem of legal services.
2896 In Earl Johnson's phrase, access to justice cannot be reached by
2897 thinking of a single-laned road. Rather, he says, we must think of
2898 a multi-laned highway.

2899 ¹⁸⁰ Id. at 55-60.

2900 On June 23, 1993, the Florida Supreme Court handed down
2901 its third opinion in this matter, ordering that the new rules on
2902 the pro bono obligations of Florida lawyers take effect in 1993
2903 with the first reporting required before July 1, 1994. The Court
2904 rules set out a simplified reporting form and the opinion makes it
2905 clear that, though lawyers will not be disciplined for the failure
2906 to live up to the Court's expectations of public service, the
2907 reporting requirement is important and "failure to report will
2908 constitute an offense subject to discipline."

2909 The two most powerful messages which came out of these
2910 opinions is the duty of lawyers to fulfill their oaths -- their
2911 profession, and the responsibility of the courts to see that all
2912 people have an opportunity to see justice done. As Justice Overton
2913 says, "[t]his Court has repeatedly recognized its responsibility to
2914 assure access to the courts."¹⁸¹ The Florida court understands
2915 its role in achieving justice in the same way that Judge Taylor did
2916 when he appointed Atticus Finch to represent Tom Robinson.

2917 The Florida plan now points the way for the involvement
2918 of every lawyer in pro bono service (except government lawyers and
2919 judges in circumstances where ethics rules, statutes or government
2920 policy prohibit such service) and assures that there will be a plan

2921 ¹⁸¹ In re Amendments, 573 So.2d at 806.

2922 to achieve access to justice in all communities and a "roll call"
2923 of all lawyers to see if they are living up to their oaths. The
2924 opinions of the court may, once again, allow lawyers to be the
2925 "connecting link."

Chapter Six

A PLAN FOR FULL ACCESS TO JUSTICE

California Justice Earl Johnson has expressed his view that we will achieve access to justice only if we think of the road to access as a multi-laned highway, not a single-lane path. This image should remind us of how often we attack the problem of access to justice with only one solution in mind -- pro bono services, funding for legal services, etc., and that success is more likely to be achieved through a combination of these efforts. Indeed, Justice Johnson's analogy brings to mind Florida Supreme Court Justice Ben Overton's analysis in his opinion ordering that a joint Florida Bar and Florida Bar Foundation Commission report to the Florida Supreme Court on recommendations for a pro bono plan and other efforts to achieve access. He recognized the many elements which may go into access:

The poor's access to the legal system is an important factor that the commission will address. In order for this justice system to maintain credibility, we realize that it must be available and affordable to all segments of society. Availability, not only for the poor, but also for those with limited funds, is another problem that merits the commission's

2949 consideration. This Court and The Florida Bar
2950 have regularly adopted programs to improve the
2951 accessibility of our judicial system. These
2952 include simplified proceedings in small claims
2953 court, probate, and dissolution of marriage
2954 matters; the development of simplified forms
2955 for a litigant's pro se use; the establishment
2956 of citizen dispute settlement centers; and the
2957 recent implementation of mediation and
2958 arbitration programs designed to resolve
2959 disputes in an efficient and economical
2960 manner. This Court has repeatedly recognized
2961 its responsibility to assure access to the
2962 courts.¹⁸²

2963 The Florida plan, then, places on Florida attorneys an
2964 expectation that they will provide direct legal services to the
2965 poor (not just "good works"), but the court does not expect that
2966 even this focused, comprehensive pro bono plan, fully backed by the
2967 court, will meet the needs of the poor.

2968 Indeed, one of the principal features of the Florida
2969 comprehensive pro bono plan requires that the chief judge of each

2970 ¹⁸² 573 So.2d at 806.

judicial circuit develop a plan to bring access to justice to their community. It is contemplated that the plan will result from an assessment of the needs of the poor being served in each community and the development of resources to meet those needs. It is useful to think about how each of these lanes in the multi-laned highway can be designed and built, and I will use Florida as a model, recognizing that the actual plan must be tailored for each local community, not the state as a whole.

The task, then, is to address the legal needs of the poor, and in Florida there are, today, 2,200,000 people in that category. These poor people are not being served and the Florida Bar/Florida Bar Foundation study indicates that 80% of the legal needs of the poor are not being met.

Lane 1: Federal Funded Legal Services

The best program to provide legal services to the poor is delivery through legal services offices, staffed by committed and well supervised full-time lawyers, paralegals and clerical help. These programs have received funding from various sources but most of these programs were initiated and continue to be supported by federal funding. There is no honest objection today to the programs as they now operate and, hopefully, the worst years of

2992 mean-spirited sniping¹⁸³ and budget cutbacks now seem to be behind
2993 us. With excellent oversight provided by local boards, these
2994 programs are serving a large client base at a minimum cost. For
2995 example, in fiscal year 1989 legal services agencies closed some
2996 1.45 million cases, for a federal appropriation of \$305 million.
2997 Florida legal services agencies closed about 75,000 cases in a
2998 year, operating on a federal appropriation of about \$13 million, by
2999 latest count.

3000 Sadly, the Congressional funding for legal services now
3001 stands at only \$350 million for all national programs, a funding
3002 level (in real dollars) 35% below what it was in fiscal year 1981,
3003 when Ronald Reagan took office,¹⁸⁴ yet there are now about 14%
3004 more people in the target group of defined poverty level citizens.

3005 This "lane" for federal funding should not be expected to
3006 lead us to full access, but it is essential that the federal role
3007 be restored to its former level and then moved to the long-targeted
3008 level of providing two federally funded legal services lawyers for

3009 ¹⁸³ Dan Quayle has commented that the legal services program
3010 is merely a "subsidy" program for lawyers. Mind you, these lawyers
3011 often forego lucrative corporate law firm offers to earn starting
3012 salaries of \$16,000 to \$20,000 in legal services agencies.

3013 ¹⁸⁴ In 1991, the Board of the Legal Services Corporation
3014 voted to ask for an increase of 50% funding, to the level of \$525
3015 million, simply to bring the program back near the level of a
3016 decade ago.

3017 every 10,000 poor people. To do this would require, in present day
3018 dollars, approximately \$790 million.

3019 If anything can be done to move Congress and the
3020 Executive Branch to this vision of access to justice, then the cost
3021 is not out of the question, but sadly, there has been little vision
3022 about the problems of the poor in this country for some years.

3023 To continue the design for Florida, full federal funding
3024 at the level of two lawyers per 10,000 poor people will mean that
3025 the federal legal services funding in Florida should fund about 440
3026 new lawyers.¹⁸⁵

3027 Lane 2: Interest on Lawyers Trust Accounts

3028 The second lane of this highway to access to justice is
3029 one of the most remarkable innovations of the last decade -- the
3030 Interest on Lawyer Trust Accounts (IOLTA) programs now in 49 states
3031 and the District of Columbia.

3032 I still marvel at the simplicity and good sense of this

3033 ¹⁸⁵ I am using the figure 2,200,000 for the population of
3034 poor people in this state. This will cost approximately \$30,000
3035 per lawyer for salary and benefits or about \$13,200,000.

program, originated by Florida Supreme Court Justice Arthur England during his service on the Florida Supreme Court. Justice England proposed this program after he observed a similar program in Canadian British Columbia and realized that interest on small or short-term trust accounts, in which lawyers held clients' money, was a source of profit for banks because lawyers were ethically prohibited from receiving any benefit. Today, 49 states and the District of Columbia have IOLTA programs and they are a major source of funding for legal services. Florida took a further step in 1989 by making the IOLTA program mandatory, so that most -- not just one out of five -- bar members now participate. As a result, the Florida IOLTA program will raise an estimated \$18 million in 1992. The results nationwide have been stunning: From the beginning of IOLTA to the end of 1991, IOLTA programs around the country had raised \$578 million. Sixty-three percent of all eligible attorneys now participate in the program nationwide.

Moreover, as more states move toward mandatory IOLTA programs, the annual revenues produced by these programs will increase significantly measured by national resources. In the last six months of 1991 alone, IOLTA programs yielded \$79 million nationwide. The total in Florida for all of 1991 was \$8.7 million. Ironically, the yield per state will decline with better technology since the program is dependent on the fact that administrative costs are too great to allow the client to get the benefit of small

3060 amounts of interest.¹⁸⁶

3061 In short, by moving from voluntary programs to mandatory
3062 ones, IOLTA programs have produced significant new revenues for
3063 legal services for the poor.

3064 Lane 3: State Funding Through Filing Fee Surcharge.

3065 The Florida Supreme Court opinion approving a
3066 comprehensive pro bono plan warned the legislature that it must do
3067 its share and, to develop some idea of what that share might be.
3068 I want to place several proposals on the table. The first
3069 contemplates a program to assess filing fees which, in Florida,
3070 vary from county to county.¹⁸⁷ This produced revenues of \$3.6
3071 million in 1991, nearly 12 percent of all funds received for civil
3072 legal services programs.

3073 There is plenty of room for growth in this source by
3074 expanding the number of counties which levy surcharges. Only 25
3075 counties (of 67 total counties) now participate at all. The Joint
3076 Commission called for the 42 counties with no programs in existence

3077 ¹⁸⁶ Of course, the programs also have far less yield when
3078 interest rates are low.

3079 ¹⁸⁷ The Report of the Florida Joint Commission on the
3080 Delivery of Legal Services to the Indigent (March 21, 1991)
3081 contained this suggestion. In re Amendments, 598 So.2d at 45.

3082 to establish them, and to raise fees which are only nominal. Were
3083 all counties to levy a \$10 average surcharge for every filing, it
3084 would yield nearly \$8 million per year.

3085 We should also consider a statewide program to assess
3086 filing fees for appellate cases. Such funds would help correct the
3087 disparities between counties and, therefore, among poor people. A
3088 reliance solely on filing fees in each community would result in
3089 disparities in resources between communities and, therefore,
3090 between poor people. This disparity can be addressed in the same
3091 way we address inequities in our system of public education through
3092 extra state funding for the communities that have greater numbers
3093 of poor people compared to the state resources provided by filing
3094 fees.

3095 For example, Palm Beach County produced \$338,302 in
3096 filing fees in 1989, while Calhoun County produced only \$300.
3097 Rather than continue glaring disparities like these, which reflect
3098 the different economic well beings of our counties, we should
3099 consider supplemental state funding for poor counties, apportioned
3100 according to their poverty populations -- perhaps using the
3101 appellate filing fee as a fund for equalization. That's what we do
3102 to equalize public school funding among counties, and we should be
3103 no less serious about equalization in legal services funding.

3104 Lane 5: A Civil Gideon Fund from Service Tax on Legal Services.

3105 To achieve full access to justice, the state may have to
3106 make a significant contribution. This can be done through a sales
3107 tax on legal services, with the revenue to support legal services
3108 to the poor. Such a proposal has been put forward by Keith Beyler
3109 and Ronald Spears in Illinois.¹⁸⁸ They suggest a 1% sales tax
3110 which, they estimate, would raise \$20 million each year for their
3111 proposed Illinois Civil Gideon Fund.¹⁸⁹

3112 No justification exists for a broad state sales tax on
3113 consumer purchases with an exemption for services, including legal
3114 services. A just tax system requires that services be included,
3115 and I hope that Florida lawyers will not resist tax proposals that
3116 include legal services. Appropriate exceptions would be necessary,
3117 of course, such exempting legal fees for criminal defense. By
3118 supporting a tax on legal services, lawyers would be able to
3119 advocate full support for the justice system including public
3120 defenders and legal services.

3121 The fifth lane, then, of the multi-laned highway could be

3122 ¹⁸⁸ Keith Beyler and Ronald Spears, Funding Access to Civil
3123 Justice, paper presented to the Allerton House Conference,
3124 sponsored by the Civil Practice and Procedures Section of the
3125 Illinois State Bar Association, May 14-16, 1992, p. 34.

3126 ¹⁸⁹ Id. at ____.

3127 a services tax on legal fees, earmarked for a Florida Civil Gideon
3128 Fund that provides funds to legal services programs for the poor.

3129 A tax on legal fees could become the mainstay of legal
3130 services in Florida. A one percent tax, for example, would yield
3131 \$38 million a year. Such a funding level would be a tremendous
3132 boost for legal services for Florida's poor.

3133 Lane 6: Distribution of Punitive Damage
3134 and Residue of Class Action Awards to Civil Gideon Fund.

3135 Beyler and Spears also propose that a substantial part of
3136 all punitive damage awards be placed in the Civil Gideon Fund¹⁹⁰

3137 ¹⁹⁰ Beyler and Spears propose the following statutes:

3138 To ensure a proper apportionment between the private
3139 and public wrongs, the jury should apportion the punitive
3140 damages as part of its verdict, just as the jury now
3141 distributes compensatory damages between economic and
3142 non-economic loss. Specifically, the General Assembly
3143 should amend section 2-1109 on itemized verdicts to add
3144 the following sentence:

3145 In all cases where punitive damages are
3146 assessed by the jury, the verdict shall be
3147 itemized so as to reflect the monetary
3148 distribution between the amount necessary to
3149 punish the defendant for the private wrong
3150 done to the plaintiff personally and the
3151 amount necessary to punish the defendant for
3152 any harm or threatened harm to the public.

3153 Then, in order to redirect the money to the Illinois
3154 Civil Gideon Fund, the General Assembly should replace
3155 the second paragraph of section 2-1207 on punitive

3156 and that unclaimed class action awards "which cannot be distributed
3157 on a cost-effective basis" also be placed in the fund.¹⁹¹

3158 If the other suggestions for the Civil Gideon Fund are
3159 used (the commitment of a portion of punitive damage awards and
3160 undistributed class action awards), the Fund will be further
3161 strengthened, although it is difficult to calculate the amount.

3162 Florida has already adopted legislation which designates
3163 the state as the recipient of a portion of punitive damages

3164 damages with the following paragraph:

3165 In cases where punitive damages are
3166 assessed, the amount assessed as necessary to
3167 punish the defendant for any harm or
3168 threatened harm to the public shall be deemed
3169 public property. The trial court shall award
3170 twenty percent of this amount to the plaintiff
3171 as compensation for vindicating the public's
3172 rights, and this award to the plaintiff shall
3173 be subject to any contingent fee contract with
3174 the plaintiff's attorney. The trial court
3175 shall direct payment of the other eighty
3176 percent to the Illinois Civil Gideon Fund.
3177 The trial court shall give notice to the
3178 Illinois Civil Gideon Fund of any punitive
3179 damage award in which it may have an interest
3180 and shall permit the Illinois Civil Gideon
3181 Fund to intervene when necessary to protect
3182 its interest in the punitive damage award.

3183 Beyler & Spears, supra note ____* at ____.

3184 ¹⁹¹ Id. at ____.

3185 awards,¹⁹² but it is not a dependable source of revenue. In the
3186 last three years, the state collected only \$411,459 in seven
3187 cases -- almost all from one case. With recent revisions,
3188 however, this legislation may produce a more substantial source of
3189 revenue.

3190 The distribution of class action awards may be a more
3191 promising idea, although I do not currently have enough information
3192 to project the revenues it could produce.

3193 Lane 7: A Fee-Shifting Statute for the Poor Who Must
3194 Challenge Government Agencies to Establish Entitlement.

3195 Another proposal by Professor Keith Beyler and Ronald
3196 Spears which deserves additional thought draws from an analysis of
3197 1989 Illinois Legal Needs which demonstrated that

3198 about one-third of the unmet legal needs of
3199 the poor in Illinois involve various
3200 government entitlement programs. About 14%
3201 involve legal problems with food stamps, AFDC,
3202 general assistance, SSD/SSI, IRAP or energy
3203 assistance, veterans benefits, AABD, circuit

3204 ¹⁹² Section 768.73, Florida Statutes.

3205 breaker, and other tax relief in the benefit
3206 programs. Another 11% involve legal problems
3207 and gaining access to physicians' services and
3208 other medical assistance. About 5% involve
3209 legal problems with public schools. The final
3210 2% involve legal problems with government-
3211 supported housing.¹⁹³

3212 To pay for this litigation, the authors propose an
3213 "Entitlements Fee-Shifting Act" which would state, simply:

3214 When a poor person establishes that an
3215 administering agency has wrongfully or
3216 erroneously denied them an entitlement
3217 benefit, the administering agency shall pay
3218 the persons' litigation expenses, including
3219 reasonable attorney's fees.¹⁹⁴

3220 The virtues of this legislation are that it would fund
3221 the real cost of a fair and equitable entitlement program, and the
3222 fee-shifting would provide a disincentive for the arbitrary
3223 administration of these programs.

3224 ¹⁹³ Beyler & Spears, supra, note __*, at 31.

3225 ¹⁹⁴ Id. at 32.

3226 Lane 8: Comprehensive Lawyer Pro Bono.

3227 The "lanes" described to this point all involve measures
3228 to raise money, most of which will ideally be spent in support of
3229 legal services offices (the most efficient delivery system to
3230 provide legal services to the poor). Alternative avenues for
3231 resources include programs that provide for comprehensive pro bono,
3232 along the lines of the Florida plan already discussed.

3233 The Florida plan begins with a statement of expectation
3234 by the Florida Supreme Court that each lawyer contribute at least
3235 20 hours each year to direct legal services for the poor.¹⁹⁵
3236 There is a buy-out provision (set at \$350 each year) for those who
3237 are not able to provide direct service.¹⁹⁶ No compulsion exists
3238 other than the requirement that lawyers report each year their
3239 service, their contribution to a legal services provider, or,
3240 alternatively, the fact that they did not provide service or
3241 contribute.¹⁹⁷

3242 Any attempt to value this contribution to legal services
3243 for the poor necessarily involves some speculation, but some

3244 ¹⁹⁵ In Re Amendments to Rules, 598 So.2d at 41, 44.

3245 ¹⁹⁶ Id.

3246 ¹⁹⁷ Id. at 42, 44.

experience exists which helps us. That experience includes the early response to programs which have been organized in anticipation of the Florida plan. It appears that a large percentage of the large law firms in Dade County have agreed to contribute services or a buy-out fee for 100% of their firm members. Overall, 40 percent of lawyers in Dade County have agreed to participate, and this is before the Florida plan takes effect.

Another source of information comes from the voluntary local bar programs in Florida which require pro bono service as part of the conditions of membership. In Tallahassee and Orlando, a lawyer may practice law without joining the local bar association, but membership in the local bar is conditioned upon accepting the commitment to participate in legal aid cases.¹⁹⁸ The program run for some years by the Orange County Bar Association

¹⁹⁸ Article III, Section 2, By-Laws of the Tallahassee Bar Association, as of April 10, 1991, states in pertinent part:

No natural person shall be eligible for election to regular membership unless he or she ... agrees to participate in the legal aid program operated by the Legal Aid Foundation, Inc., or alternative forms of legal aid service approved by the Board of Directors, and who agrees to abide by the By-Law of this Association.

It is important to note that while the By-Laws of the Tallahassee Bar Association does provide for certain exceptions to this requirement, such as judges and judicial clerks, it does not provide a "buy-out" provision common in other pro bono programs.

3276 in Orlando has a "buy-out" feature similar to the Florida plan,¹⁹⁹
3277 and can be used as a reliable indicator to estimate the likely
3278 impact of the Florida plan. In Orlando, approximately one half of
3279 the lawyers who are members of the voluntary bar association,
3280 Orange County Bar Association,²⁰⁰ take on one or more cases each
3281 year, and approximately half choose to pay the "buy-out fee."²⁰¹
3282 Using this model, we can estimate the likely result in Florida.

3283 In 1993 there were almost 49,000 lawyers admitted to
3284 practice in Florida and about 39,000 were practicing in the state.
3285 If we were to assume that each Florida lawyer practicing in Florida
3286 (39,000) would donate at least 20 hours annually, it will mean that
3287 poor people in Florida will have 780,000 additional hours or

3288 ¹⁹⁹ See Article II, Section 4(B), By-Laws of Orange County
3289 Bar Association, Inc., provides that:

3290 [t]he Executive Council, by majority vote of
3291 all members, may terminate the membership of
3292 any member of this Association for ...
3293 [u]njustified failure of (sic) refusal to
3294 accept legal aid referral cases.

3295 ²⁰⁰ As of Feb. 1993, 2,792 attorneys were practicing in
3296 Orange County of which 1,993 were members of the Orange County Bar
3297 Association.

3298 ²⁰¹ In 1992, 878 members of the Orange County Bar Association
3299 paid the buy-out option, whereas 778 attorneys accepted legal aid
3300 cases. Two hundred and eleven members chose to participate in pro
3301 bono related activities such as the Homeless Advocacy Project,
3302 Telephone Screening, Citizen Dispute Settlement or the Community
3303 Education Project. An additional 94 non-Orange County Bar
3304 Association attorneys either provided pro bono services or
3305 contributed money.

services or, if we calculate 1500 hours per full time lawyer, 520 additional full time lawyers. That's nearly three times the number of legal services lawyers now working in Florida -- a decisive step for serving the legal needs of poor people. That calculation is probably too optimistic for the first years of the program.²⁰²

If we assume that, in the first year, sixty percent of Florida lawyers will participate (a figure I extrapolate from the early experience in Dade County),²⁰³ and that half of these lawyers will provide direct services to the poor and half will contribute to the "buy-out" option (calculations drawn from the Orange County Bar Association experience), then we have a basis for making rough estimates.

Before placing these estimates, I want to venture a guess at the level of participation after three years of the Florida plan. Assuming strong leadership from judges and state and local

²⁰² Statistics supplied by The Florida Bar, February 1, 1993.

²⁰³ The Dade County program was launched prior to the implementation of the Florida Supreme Court's pro bono rule. The program's early success in Florida's largest county may provide some indication of how the plan might work. In less than one year, 4,000 of Dade County's 9,500 lawyers have participated in the program, undertaking 1,137 cases and helping over 3,000 clients. Lawyers who opted not to provide direct legal services have provided \$68,485 through May of 1992. A general discussion of that plan appears in Eugene J. Fierro, "It's Here -- Now What? A Primer on Attorney Pro Bono Services," LXVI, No. 9 The Florida Bar Journal (October 1992), p. 16.

3333 bars, there is every reason to believe that participation can be
3334 increased to a level of 80-90% of the in-state Florida lawyers. I
3335 make this estimate believing that lawyers and judges are sincerely
3336 interested in achieving access to justice, and that the requirement
3337 of annual public disclosure will help remind lawyers of their
3338 obligations. Further, the public nature of this information will
3339 help provide peer pressure for lawyers to live up to their oaths.
3340 Finally, I hope that judges and bar leaders who take this quest for
3341 equal justice seriously will use the annual disclosures to
3342 influence those lawyers who do not initially participate. I
3343 envision judges and bar associations using the lists of non-
3344 participating lawyers as a roll call for service and urging those
3345 lawyers to provide direct service or to contribute. Over time,
3346 this process should presumably build the level of service evident
3347 in the Tallahassee Bar and the Orlando Bar. Indeed, the pressure
3348 is similar in that lawyers are known to belong or not to belong to
3349 the local bar association, and those lawyers who do belong are
3350 known to support legal aid programs. Again, this experience helps
3351 me with my estimates. In Orlando, about 76% of the lawyers in
3352 private practice belong to the Orange County Bar Association and
3353 are therefore providing services or resources along the scale of
3354 those which the Florida Supreme Court expects under the Florida

3355 plan.²⁰⁴

3356 Equipped with these estimates then, we can look at the
3357 contributions of Florida lawyers under the Comprehensive Pro Bono
3358 Plan:

3359 I estimate that sixty percent of Florida lawyers
3360 practicing in state will participate in the first full year. Half
3361 of these will contribute direct legal services, half will
3362 contribute to the "buy-out."

3363	30% of 39,000 in-state lawyers	11,720
3364	20 hours of direct legal	
3365	services	<u>x20</u>
3366	Total additional hours of	
3367	direct legal services	234,400
3368	30% of lawyers make	
3369	contributions	11,700
3370	Contribution level	<u>x350</u>
3371	Total Contributions	\$4,095,000

3372 ²⁰⁴ The number of attorneys practicing in Orange County,
3373 2,792, was received from the Florida Bar Association as of Feb.
3374 1993. The Legal Aid Society of the Orange County Bar Association,
3375 Inc. indicated that the Orange County Bar had around 1,967 members
3376 in 1992. In addition, the Legal Aid Society reported that 32 non-
3377 Orange County Bar Association attorneys contributed money to the
3378 program and 36 others participated in pro bono related projects or
3379 cases.

3380

3381 Assuming that the number of lawyers licensed and
3382 practicing within the State of Florida continues to grow at 4%, and
3383 assuming that 90% of Florida's lawyers would participate in the
3384 program in the third year -- half giving service, the other giving
3385 money -- then these figures would be 380,304 hours of service to
3386 the poor and \$6,655,250 of contributions.

3387 The importance of this "lane" is obvious. Assuming that
3388 the average legal services lawyer delivers 1500 hours of legal
3389 services to poor clients each year and that salaries and benefits
3390 for each of those lawyers averages \$30,000 annually, the Florida
3391 Comprehensive Pro Bono Plan should substantially increase the
3392 availability of legal services by over four hundred lawyers.²⁰⁵

3393 The importance of this "lane" lies not just in its direct
3394 contributions of services and money, but also in its potential to
3395 restore to the bar the culture of service and to empower lawyers to
3396 argue for the development of all the other "lanes."

3397 ²⁰⁵ If my figures are accepted, the 351,000 hours should
3398 translate into 234 lawyer years and the approximately \$6,000,000
3399 should hire 200 lawyers for a total of 434. I have not calculated
3400 the impact of other costs such as secretarial services, office
3401 rental, etc., but I note that lawyers contributing services are
3402 also contributing these overhead costs.

Thus, Lane 8 is the most important lane. The integrity and the public spirit with which we approach this lane will be observed by others, and our zeal will determine whether we continue to be the connecting link of American society.

Lane 9: The Local Plans for Access to Justice.

One of the most important features of the Florida Supreme Court plan is the idea that each community should develop its own plan to achieve access to justice. I envision that a group of lawyers in private practice, legal service providers, social agencies and others will be called together by the Chief Judge of each circuit to share information on the legal needs of the poor.

The local plans should look at other sources of funds (United Way, local foundations, etc.) and should help develop the significant collateral programs which can help achieve access. These include pro se training, simplified legal forms, programs for specialized non-lawyer help (court clerks, legal specialists), etc.

Summary

We have now described a number of ways that we might seek access, and it is useful to compare the situation today with our model and the following tally is a rough attempt to do that:

3423 Summary of Estimate Resources

3424 From All the "Lanes"

3425 Lane One: Federal funded legal services at
3426 the rate of 2 lawyers per 10,000 poor people.
3427 This should yield 440 new lawyers who are
3428 paid, with benefits, an average of \$30,000 per
3429 year.²⁰⁶

3430 Estimate: \$13,200,000

3431 Lane Two: Interest on lawyers' trust accounts
3432 which is already in place, is not expected to
3433 yield as much money in the future.

3434 Estimate: \$6,000,000

3435 Lane Three: Surcharge on filing fees in all
3436 counties.

3437 Estimate: \$8,000,000

3438 Lane Four: Services tax on lawyers' fees
3439 (1%).

3440 Estimate: \$38,000,000

3441 ²⁰⁶ No capital costs or secretarial costs are calculated.

3442 Lane Five: Punitive damage fund.

3443 Estimate: \$150,000

3444 Lane Six: Fee shifting statute for
3445 entitlement programs.

3446 Estimate: \$1,000,000

3447 Lane Seven: Comprehensive pro bono.

3448 Cash Contributions Estimate:²⁰⁷ \$4,000,000

3449 Value of Service:²⁰⁸ \$4,608,000

3450 Lane Eight: Local plans for access.

3451 Estimate: No estimate

3452 Thus, the total of resources for legal services to the
3453 poor should be in the neighborhood of 75 million dollars and, when
3454 coupled with other strategies such as pro se training, alternative
3455 dispute resolution and simplified legal forms, should make access
3456 to justice for poor people a reality even if the federal
3457 authorities do not increase their support.

3458 ²⁰⁷ Based on assumption that legal services lawyers work
3459 1,500 hours a year and average salary and benefits are around
3460 \$30,000 annually.

3461 ²⁰⁸ Id.

3462 I have described the various lanes of a highway which
3463 will lead us to the goal of access to justice. When I spoke in
3464 Seattle at the launching of a campaign to raise money for legal
3465 services in the Spring of 1991, I used another analogy which
3466 described these lanes as tributaries feeding a mighty river. After
3467 my speech, James Noe, a very thoughtful state court judge came
3468 forward and said that the analogy of the river is better. He
3469 reminded me of the passage from the Book of Amos: "Let justice run
3470 down like waters, and righteousness like an everlasting stream."

3471 We know that these waters are shallow in America today.
3472 We know that lawyers have a special responsibility. And we know
3473 that our support for comprehensive pro bono programs can raise the
3474 waters, quicken the flow, and nourish the thirst of poor Americans
3475 for justice before the law. I hope that lawyers will be stirred by
3476 this vision of justice, and that we can help the delivery of legal
3477 services become an "everlasting stream."

Chapter Seven

THE MODERN LAW FIRM:
FROM WALTER CARTER TO FINLEY KUMBLE

Discussing the legal profession and the problem of connecting the profession with the community led me to think about the development of the modern law firm. Large corporate law firms in downtown highrises have come to replace the small country office on Main Street as the model for where lawyers work. Most lawyers have heard of Finley, Kumble, the ill-fated go-go law firm of the 1980's whose fate is captured by the derisive reference to the firm name -- "Finally, Crumbled."²⁰⁹ Not so many will have heard of Walter Carter.

Walter Carter was a lawyer who practiced in Milwaukee and Chicago before moving to New York in 1881. According to the legal historian Calvin Woodard, "Carter sensed the strategic importance of the growing pool of young law students graduating annually pre-tested, certified, with Law Review credentials, and faculty endorsed -- from the case method law schools. He restructured his own firm so as to capitalize on that new resource."²¹⁰ Carter,

²⁰⁹ The firm of Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson and Casey started from a small base in 1968 and grew to seven hundred lawyers in twenty-five cities worldwide before it dissolved in 1987.

²¹⁰ Calvin Woodard, "Progress and Poverty in American Law and Legal Education," 37 Syracuse Law Review 795, 817 (1986).

3526 Woodard tells us, invented not only the law firm, but the "young
3527 associate."²¹¹ He was successful, and a list of the law firms
3528 founded by lawyers who passed through his office is amazing:

- 3529 (1) Breed, Abbott & Morgan (H.H. Abbott)
- 3530 (2) Milbank, Tweed, Hadley & McCloy (Harrison Tweed)
- 3531 (3) Cadwalader, Wickersham & Taft (G. Wickersham and
3532 H.W. Taft)
- 3533 (4) Donovan, Leisure, Newton & Irvine (G.S. Leisure)
- 3534 (5) Dwight, Royal, Harris, Koegel & Caskey (R.E.
3535 Dwight, K.C. Royall and O.G. Koegel)
- 3536 (6) Hughes, Hubbard & Reed (Chas. E. Hughes, Jr. and
3537 R.S. Hubbard)
- 3538 (7) Cahill, Gordon & Reindel (J.P. Cotton of the
3539 predecessor firm)
- 3540 (8) Wilkie, Farr, Owen & Gallagher (W.B. Hornblower of
3541 the predecessor firm)
- 3542 (9) Mudge, Stern, Baldwin & Todd (H.A. Kingsbury of the
3543 predecessor firm)
- 3544 (10) Mitchell, Capron (James Byrne of the predecessor
3545 firm)
- 3546 (11) Cravath, Swaine & Moore (Paul Cravath)²¹²

3547 ²¹¹ Id.

3548 ²¹² Id. at 818.

3549 These great firms were developed in a way which organized
3550 the new lawyers into an efficient and well supervised labor force.
3551 Even though they were, originally, quite small, they were known as
3552 "law factories," and they existed to serve the growing corporate
3553 interests.²¹³ The Carter model of recruiting the most talented
3554 law graduates directly from school, paying them well and building
3555 a practice oriented to corporate interests is a widely imitated
3556 model.²¹⁴ The Carter model has grown so much that law firms of a
3557 size far beyond Carter's imagination have been constructed and the
3558 management of law firms has likewise changed greatly. Many of the
3559 individuals who passed through the Carter office, and the offices
3560 shaped by the Carter model, added new features to the basic model.
3561 Over the years, these organizations and others developed the "Wall
3562 Street" law firm model, which is characterized by the recruitment
3563 of extremely bright law graduates who enter the firm without
3564 previous experience and who are trained in the handling of work for
3565 the wealthy and major corporate interests. These lawyers work
3566 under the direction of the more senior lawyers.²¹⁵ The "juniors"
3567 of the early days are now known as "associates" and there are,

3568 ²¹³ Id. at 815.

3569 ²¹⁴ Id. at 818 n.39.

3570 ²¹⁵ Some writers have referred to this as the "Cravath
3571 system," after Paul D. Cravath, whose name still is known as the
3572 first name of one of the great law firms, Cravath, Swaine and
3573 Moore, of New York. Paul Cravath worked for Walter Carter, first
3574 as an associate and then as a partner, from 1885 to 1891.

3575 typically, more associates than partners. After a period of time
3576 (usually five to ten years), the associates who are deemed the most
3577 successful and promising are taken into the partnership with all
3578 the increase in prestige and compensation which that status
3579 confers. The Wall Street model contemplates that the law firms
3580 will control the quality of the work and ensure that lawyers are
3581 socialized in the profession.

3582 There is some evidence that lawyers are moving more and
3583 more to this model. The Young Lawyers 1990 survey on the State of
3584 the Legal Profession indicates that most lawyers (78%) have private
3585 practice as their primary job setting and, though the percentage of
3586 lawyers in solo practice remained static since 1984, lawyers
3587 increasingly are practicing in larger firm environments.²¹⁶

3588 ²¹⁶ ABA Young Lawyers Division, supra, note __*, at 7.

Percentage of Lawyers by Size of Firm
1990 v 1984

		<u>1990</u>	<u>1984</u>
	Solo Practice	23%	23%
	2-3 Lawyers	17%	21%
	4-9	16%	22%
	10-20	12%	11%
	21-30	5%	5%
	31-60	7%	6%
	61-90	5%	3%
	91-200	7%	9%*
	More than 200	9%	

*In the 1984 survey, the highest category was "more than 90."²¹⁷

The report concludes:

In looking at this table, we see empirical evidence of the growth of law firms during the past six years. The percentage of lawyers in firms of 2-9 lawyers has fallen from 43% to 33% and the percentage in law firms of more than 90 lawyers has risen from 9% to 16%.²¹⁸

Lawyers have tended to gather in ever larger numbers in law firms and the term "large law firm" has changed over the years. In New York today, a lawyer in a 50-75 person law firm will

²¹⁷ Id.

²¹⁸ Id.

3615 typically identify that firm as a "small" or "mid-size" firm.

3616 The growth of these firms does not mean that they provide
3617 a stable place for practice. The surveys indicated a growing
3618 instability in the lawyers' job setting. In comparing the results
3619 of the 1984 ABA survey and the longitudinal survey of the same
3620 respondents in 1990 against the new survey of lawyers admitted
3621 since 1983 (the "new cohort"), the study concluded:

3622 A comparison of the tables for all 1984
3623 respondents and for the new 1990 cohort
3624 reflects the increasing instability of legal
3625 employment. The new cohort, which had only
3626 been out of law school six years when they
3627 were asked the question, had only slightly
3628 less changes in employment since graduating
3629 law school than the entire 1984 sample which
3630 was a sample of the entire profession with law
3631 school graduation dates back to the 1930s.

3632 The greater stability of those who graduated
3633 before the 1980s is further demonstrated by
3634 the results of a question asked in 1990 of how
3635 long lawyers had been with their current
3636 firm/employer.

How Long With Current Firm/Employer
For Lawyers Graduating Law School in 1979 or Earlier
By Job Setting

	<u>Private</u>	<u>Corp.</u>	<u>Govt.</u>
Less than One Year	4%	3%	1%
1-3 Years	7%	20%	12%
4-9 Years	20%	29%	49%
10 or More Years	70%	48%	38% ²¹⁹

One feature of the large law firm is specialization of a type which is not usually seen in a small firm setting. The data indicate that specialization is growing and many lawyers today are likely to spend a considerable amount of their professional time in specialty practice. The 1990 Young Lawyers survey concluded that "37% of all lawyers in private practice spend 75% or more of their time in one field and that an additional 27% spend 50-74% of their time in one field."²²⁰ Specialization is a large firm phenomena, but it is not limited to large firms.

What is this work comprised of? Again, the Young Lawyers 1990 survey gives us some idea about the nature of lawyers' work in the following table:

²¹⁹ Id. at 10-11.

²²⁰ Id. at 14.

3659	Percentage of Time Spent by Lawyers in Private Practice				
3660	In Various Activities				
3661		<u>0-5%</u>	<u>6-20%</u>	<u>21-49%</u>	<u>50-74%</u> <u>75%+</u>
3662	Client Contact	14%	46%	30%	5% 3%
3663	Research/Memo Writing	33%	44%	16%	4% 3%
3664	Negotiation	38%	42%	18%	2% 1%
3665	Depositions	67%	25%	8%	1% 0%
3666	Trials/Court/Administrative				
3667	Appearances	41%	37%	17%	4% 1%
3668	Client Development	66%	28%	4%	1% 1%
3669	Misc. Personal/Telephone				
3670	Contact	33%	47%	16%	4% 1%
3671	Internal Administration	54%	36%	8%	1% 1%
3672	Drafting Instruments	31%	38%	23%	5% 3%
3673	Non-law Related Work	78%	20%	2%	0% 1%
3674	Clerical Work	80%	17%	2%	0% 1% ²²¹
3675		* * *			

3676 The breakdown of billable hours and firm policy on
3677 billable hours shows that, though large firms are far more likely
3678 to have policies on billable hours and lawyers in firms larger than
3679 ten lawyers are far more likely to bill more than 120 hours per
3680 month, the percentage of lawyers who work more than 200 billable
3681 hours is the same for solo practitioners and lawyers in firms of
3682 over 200 attorneys.²²²

3683 The trend to practice in even larger firms, coupled with
3684 the trend to greater specialization, tells us that the stable,
3685 small firm, small town general practice model is less and less

3686 ²²¹ Id. at 15.

3687 ²²² Id. at 22.

3688 representative of a typical lawyer's practice.

3689 The consequences of these trends are that lawyers are
3690 increasingly out of touch with their communities and increasingly
3691 in the service of those who require large law firms or specialists.
3692 The situs for delivery of legal services is increasingly from large
3693 downtown office buildings in Megabank Plaza -- less and less from
3694 the storefront office on Main Street. The distinguished lawyer and
3695 diplomat, Sol Linowitz, a member of one of the best known American
3696 law firms, spoke to the Cornell Law School Centennial in April 1988
3697 about the problem of the enormous law firms:²²³

3698 These escalating numbers disguise an even more
3699 pervasive problem facing the profession. The
3700 individual attorney has become increasingly
3701 distanced from the human client. Associates
3702 at our large firms spend years writing
3703 research memos before they ever meet a client.
3704 And they may never encounter individual
3705 clients who need the counsel of lawyers to
3706 deal with their personal problems. We have
3707 been witnessing the dehumanization of the law,

3708 ²²³ Quoted by Richard W. Moll, The Lure of the Law (Penguin
3709 1990), p. 217.

3710 and this has been accompanied by a widespread
3711 distrust and suspicion of lawyers. The public
3712 impression that the practice of law has become
3713 a money-making, profit-maximizing undertaking
3714 has brought into question the intention, the
3715 integrity and the value of lawyers generally.

3716 Walter Carter has many disciples, and his "law factory"
3717 taught his bright young lawyers to build their practice on the
3718 theory that the great talent of the young law graduate could be
3719 organized to provide high quality legal work for complex corporate
3720 transactions. In recruiting, some attention may be given to a
3721 prospect's character and personality, but the real premium is
3722 placed on brain power. Experience is not valued highly. Under the
3723 Carter model, law schools are not expected to produce trained
3724 lawyers but, rather, persons with great analytical skills who could
3725 be trained by the firms.

3726 In some sense, the assumption of the Carter model for law
3727 associates is similar to the assumption of the Langdell model for
3728 law professors -- experience in law practice is not a particularly
3729 desirable trait. Indeed, the relationship between the large law
3730 firms and the academy is close. Many law professors begin their
3731 careers with several years at one of the large law firms before
3732 moving on to teaching and, to the extent that law teachers have any

3733 knowledge of law practice, it is likely to be knowledge of large
3734 firm practice and preparation for this type practice has become the
3735 focus for most legal educators even though most lawyers will
3736 practice by themselves or in small firms.

3737 The assumption of this law firm practice model for much
3738 of legal education has benefitted both the large law firm and the
3739 law professors. It has helped the large law firms by socializing
3740 law students towards the type of practice conducted by the large
3741 law firms and away from what the law professors frequently
3742 characterize as the "less challenging" general practice. This
3743 arrangement has served law professors quite well by creating a
3744 rationale for avoiding any training of students for law practice
3745 which, when done properly, can be rather arduous.²²⁴

3746 Law firms have their own dynamics. Some of the tensions
3747 and some of the rewards of practice are communicated by the
3748 television series, "LA Law," which features the fictional firm of
3749 MacKenzie, Brackman, Cheney, Kuzak & Becker. Marc Galanter and
3750 Thomas Palay observe that

3751 ²²⁴ This assertion is obviously a generalization and,
3752 though it risks offending the best of the law professors, I take
3753 that risk to make the point that large lecture courses given by
3754 professors who have given these lectures for years does not
3755 require great energy and, since law schools do not require
3756 frequent tests or direct evaluations, the grading and counseling
3757 function does not draw on the energy of law professors.

'LA Law' differs strikingly from earlier portrayals of lawyers on television (and in the movies), like 'Perry Mason' or 'The Defenders.' There are more lawyers in the office -- more than would be involved in any single case. We are made aware of the firm as a presence which enlarges and limits its lawyers and binds them (at least temporarily) to a common fate."²²⁵

Many lawyers do not like the program, "L.A. Law," complaining that it takes too great artistic license with technical legal issues and that it portrays lawyers' ethics in an unfavorable light. However, it seems that a great many lawyers watch "L.A. Law," and its portrayal of large firm practice is not nearly so condemning as the movie, "The Verdict."²²⁶ Neither MacKenzie, Brackman nor the firm led by James Mason in "The Verdict" were truly large law firms of the type that have grown from Walter Carter's modest beginnings, the firms that have provided the leadership for the rest of the

²²⁵ Marc Galanter & Thomas Palay, Tournament of Lawyers ix (1991).

²²⁶ The James Mason character in "The Verdict" demonstrated the ultimate in cynical behavior about the system and about the way that large firms can overpower their weaker opponents in presenting a case. This is not to say that the ethical conduct of the plaintiff's lawyer, portrayed by Paul Newman, was a model to be emulated.

profession and which, by their success, have led to widespread imitation.

This extraordinary growth has been studied by Marc Galanter and Thomas Palay in their book, Tournament of Lawyers, which points out that the growth law firms is a function of both external and important internal forces. Law firms' growth, they conclude, is not linear, but exponential:

The constant percentage increase from 1922 onward implies an exponential growth pattern in which the firms early growth will appear -- in absolute numbers -- quite unremarkable. After all, a firm that began with one person in 1920 and grew by 10 percent per year would still have only six lawyers in 1940. But eventually, as the 10 percent is applied to an ever larger base, the exponential character of the firm's growth would assert itself. The same firm that grew to six attorneys prior to World War II would have forty-five attorneys in 1960 and three hundred five lawyers a mere twenty years after that.²²⁷

²²⁷ Galanter and Palay, supra, note __*, at 79.

3806 The reasons for this, Galanter and Palay explain, is the
3807 law firm's function as a method of matching excess human capital
3808 (read, the business-getting or "rainmaking" of senior partners)
3809 with the young lawyer who has no clients and no experience, and who
3810 leaves American law schools with no training in practice
3811 skills.²²⁸ The title of their book is drawn from the core
3812 management technique employed by these large firms which conduct a
3813 contest, or tournament, of lawyers to decide who will achieve
3814 partnership with the monetary and prestige rewards.²²⁹

3815 The character of the large law firms and the practice
3816 itself is greatly influenced by this technique, which obviously
3817 draws large firm lawyers into a highly competitive environment with
3818 the attendant stress. This analysis begins to account for much of
3819 the dissatisfaction expressed by lawyers.

3820 The large law firms are not mere pyramid schemes, and
3821 this form of organization of the profession deserves some praise,
3822 for, as Galanter and Palay observe:

3823 ²²⁸ Id. at 90-93.

3824 ²²⁹ Id. at 100. A critique of this work which accepts the
3825 "tournament" theory but builds on it was recently published by
3826 Richard H. Sander and E. Douglass Williams, "A Little Theorizing
3827 About the Big Law Firm: Galanter, Palay, and the Economics of
3828 Growth," 17 Law & Social Inquiry 391, 411 (Summer 1992).

3829 Law practice, or at least that part of it
3830 that serviced large organizations, departed a
3831 century ago from the individual practice
3832 format for doing legal work. But it never
3833 arrived at the great bureaucratic corporation
3834 as a format for practice. . . . The big firm
3835 form carried an inadvertent commitment to
3836 exponential growth, but growth was
3837 sufficiently slow to be compatible for a long
3838 period with "professional" forms of
3839 governance. So law practice has never
3840 suffered the separation of ownership from
3841 control; control of work by others was, in
3842 aspiration at least, only temporary. Compared
3843 to other business services, law remained
3844 relatively unconcentrated, decentralized,
3845 unbureaucratic and worker-managed.²³⁰

3846 But, they note, the large law firm is past its "golden
3847 age" (which the authors place around 1960) and "the sense that such
3848 firms as the chosen vehicles of the professional ideal has

3849 ²³⁰ Id. at 138.

3850 waned."²³¹ The grounds for the attack on the large firm are
3851 various:

3852 They have been assailed for abandoning their
3853 responsibilities as officers of public justice
3854 in favor of a narrow devotion to client
3855 interests. As they have grown and been
3856 transformed, they have been attacked as having
3857 sacrificed client interests to market
3858 considerations as well as having abandoned the
3859 collegiality and self-governance that made
3860 them good workplaces. The relationship of the
3861 large firm to professionalism now seems quite
3862 problematic.²³²

3863 The changing environments for law firms are occasioned by
3864 changes in the society and by the economy, and include such forces
3865 as the large increase in the number of lawyers (and number of large
3866 firms), the entry of large numbers of women to the profession, new
3867 technology, a marked increase in business litigation, the growth of
3868 in-house counsel, the development of marketing techniques by law
3869 firms, the expansion of practice into multi-city operations, and

3870 ²³¹ Id. at 137.

3871 ²³² Id. at 138.

3872 the increase of specialties.

3873 These problems of law firms are problems which have, in
3874 some measure, always existed. Galanter and Palay believe that very
3875 real problems are inherent in today's large law firms due to (1)
3876 the consequences of exponential growth and the "magnitude of the
3877 inevitable structural changes," and (2) "the challenges to long-
3878 accepted models of professional life," which because of the new
3879 system of knowledge and information now make it harder to avoid
3880 challenges.²³³

3881 Most important is the "revenue gap" which challenges the
3882 base premise of the tournament. As Richard Sander and E. Douglass
3883 Williams explain:

3884 Once adopted, the tournament tended to lock
3885 the firms into fairly rigid, geometric
3886 patterns of growth, where the rate of
3887 expansion could only increase, never decrease.
3888 This expansion generally accelerated after
3889 1970, when the demand for legal services
3890 increased, and is only now confronting its
3891 first crisis, as law firms have individually

3892 ²³³ Id. at 69.

and collectively become so vast that they have
finally outrun the growth of demand.²³⁴

The Galanter and Palay observations about a new crisis in large corporate law firms was written before law firms experienced the impact of the recession of the early 1990's and the resultant widespread cutbacks of associates and even partners, before the frightening failures of some well established law firms, and before the vulnerability of large corporate law firms had been so powerfully demonstrated by the seizure of assets of Kaye, Scholar by the Resolution Trust Corporation. All of these developments challenge the assumptions on which the large law firms are built. Those assumptions -- that growth is rewarding to the partners, that the large firm practice offers the best opportunity for training and advancement of young lawyers, and that careers spent in the service of large business interests will be the most stimulating environment for law practice -- are now very widely challenged.²³⁵ Steven Brill, the founder and editor of The American Lawyer whose reporting and analysis about large American law firms has helped law firms to understand and fear their new environment, has recently written an article entitled "Lopping Off A Third" in which

²³⁴ Sander and Williams, op. cit., footnote ___, p. 404.

²³⁵ It is time, however, that for the extremely well established firms, the profits remain very high. See, Barnaby J. Feder, "A Revenue Record for the Biggest Law Firms," The New York Times, June 29, 1992, p. D1.

he suggests that there is a great glut in the availability of lawyers who do corporate work on a billable hours basis and concludes that this glut constitutes a crisis for the large corporate law firms, particularly those which grew so rapidly in the last several decades. Brill talks about the trends which are causing this crisis:

The combination of public disgust with the cost of litigation; client muscle in the form of general counsel armed with case matter staffing and budgeting restrictions; and the widespread (and now heavily marketed) availability of alternatives, such as ADR, to sending the troops in for a full-scale fight is now likely, finally, to begin to squeeze that waste out.²³⁶

The failure of law firms, the retrenchment of law firms and the continued talk of crisis is fueling a considerable uneasiness.

The fall of Finley, Kumble was the most spectacular and public of the recent large law firm failures, but it was not the

²³⁶ Steven Brill, "Lopping Off A Third," The American Lawyer (June 1993) page 5.

3939 only one. The 56 year old firm of Webster & Sheffield and the
3940 Boston-based firm Gaston & Snow dissolved in 1991,²³⁷ and many law
3941 firms have laid off lawyers, including partners. The cutback on
3942 hiring and summer clerkship programs have sent shudders throughout
3943 law schools.

3944 There is also a great deal in the law press and even
3945 general circulation newspapers about the rather desperate condition
3946 of many large firms, some of them quite old and respectable, which
3947 are facing the trauma of a recessionary economy and the post-
3948 mergers and acquisitions frenzy. The stories of cutbacks, reduced
3949 recruiting goals, the discharge of associates, even the firing of
3950 partners, are now bringing a new perspective to the practice of law
3951 in large law firms. The cover of the March 1993 American Bar
3952 Association Journal was entitled "Shrinking Law Firms" and one of
3953 the stories reports the down-sizing of large law firms.²³⁸ The
3954 article begins with the report of a Dallas law firm which had more
3955 than 300 lawyers at the end of 1990, but was reduced to barely 200
3956 by the beginning of 1993 and continues to cite to other examples --
3957 Skadden, Arps, Slate, Meaghen & Flom down from 1,100 to 976 or so,
3958 Latham & Watkins' shrinkage from 640 to 580. This article also

3959 ²³⁷ Julia Lawlor, "Slump Puts Profession on Trial: Lawyers
3960 Facing Layoffs," USA Today, June 3, 1991, at 1.

3961 ²³⁸ Don J. DeBenedictis, "Growing Pains," ABA Journal
3962 (March, 1993), p. 52.

3963 reported the results of the 1991 Price Waterhouse Law Firm
3964 Statistical Survey based on data from 373 firms which participated
3965 in the survey from 1987 to 1991 and the annual growth rate for the
3966 categories of personnel is quite revealing:²³⁹

3967		<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>1991</u>
3968	Total attorney staff	10.0%	7.4%	6.4%	2.1%
3969	Equity partners	7.4	6.9	6.9	4.2
3970	Non-equity partners	15.1	7.0	11.2	14.0
3971	Associates	10.9	7.1	5.5	-0.5
3972	Legal assistants	10.0	8.2	1.9	-5.8
3973	Support staff	10.5	7.6	5.0	-2.4

3974 Moreover, there is a considerable movement among
3975 corporate counsel to question the value of large firm services and
3976 the utility of the "billable hour" practice for billing large
3977 clients is very much in question. Corporations are looking to
3978 increasing their use of in-house counsel and some corporations are
3979 experimenting with "captive" or one-client law firms. The downturn
3980 of the 1990s means that some restructuring has taken place and the
3981 radical drop in the median amount spent on legal fees in 1991 by
3982 the surveyed Fortune 500 companies "a whopping 24% decline" is

3983 ²³⁹ Op. cit., p. 56.

3984 widely thought to be a trend which will not be fully reversed.²⁴⁰

3985 We may be at a time when it is productive to ask whether
3986 Walter Carter's invention is developing in a way which serves
3987 society, the associates it depends on, the clients they serve, or
3988 even the partners it enriches.

3989 The story of American corporations is the story of
3990 increasing detachment from local communities and of a mobile,
3991 highly compensated corporate elite. Perhaps executives have not
3992 always been the embodiment of Tom Wolfe's model of the investment
3993 banker, the character in Bonfire of the Vanities, who considered
3994 himself to be the "master of the universe" -- but there are at
3995 least aspects of that stereotype evident in corporate life.
3996 Lawyers have been drawn down the same path and the exaggerations of
3997 John Grisham's popular book, The Firm,²⁴¹ need not be accepted to
3998 recognize that large law firms have the real potential to become
3999 corrupting institutions. The history of the large firm is a
4000 history of increasing economic and political power and increasing
4001 detachment from the community.

4002 ²⁴⁰ Op. cit., p. 53, citing the 1992 Law Department
4003 Spending Survey conducted by Price Waterhouse.

4004 ²⁴¹ John Grisham, The Firm (Island Books, Dell Publishing,
4005 New York, 1991).

4006 Indeed, the very foundation of the large law firm and its
4007 early culture was based on an affinity with corporate clients and -
4008 - please understand that I mean to say this -- a hostility toward
4009 litigation and disdain for courts.

4010 The impact of the Walter Carter style law firm was felt
4011 very soon after it came into existence, and the tormented rhetoric
4012 about law becoming a business rather than a profession began about
4013 the same time. Quite early in this century, as the legal
4014 profession moved increasingly to serve America's growing
4015 businesses,²⁴² the discussion began. Galanter and Palay remind us
4016 that, in 1905, Finley Peter Dunne, the great American humorist,
4017 picked up on this trend as he put words into the mouth of his Mr.
4018 Dooley:

4019 [I]f I had me life to live over again I'd be a
4020 lawyer. 'Tis a noble profissyon. It's nobler
4021 now then it used to be in th' old days whin a
4022 lawyer had to go into court an' holler till he
4023 was hoorse to arn his fee. ...

4024 "Don't ye iver go into coort," says I.

4025 ²⁴² See Woodard, supra note __*, at 815 (tracing the
4026 increase of corporate law) (quoting R.T. Swaine, The History of
4027 the Cravath Firm, 1819-1947 369 (1946)).

4028 "What wud I be doin' in a smelly coort room
4029 talkin' up to a man that was me chief clerk
4030 last year?" says he. "no sir, th' law is a
4031 diff'rent profissyon then what it was whin
4032 Dan'l Webster an "Rufus Choate an' them gas
4033 bags used to make a mightly poor livin' be
4034 shoutin' at judges that made less. Th' law
4035 to-day is not only a profissyon. It's a
4036 business. I made a bigger honorarium last
4037 year consolidatin' th' glue inthrests that
4038 afterwards wint into th' hands iv a receiver,
4039 which is me, then Dan'l Webster iver thought
4040 was in th' goold mines iv th' wurruld. I
4041 can't promist to take a case f'r ye an' hoot
4042 me reasons f'r thinkin' ye'er right into th'
4043 ears iv a larned judge. I'm a poor speaker.
4044 But if iver ye want to do somethin that ye
4045 think ye oughtn't to do, come around to me an'
4046 I'll show ye how to do it," says he.²⁴³

4047 Marc Galanter and Thomas Palay's recent book, Tournament
4048 of Lawyers, uses this quote to make a point about the culture of

4049 ²⁴³ Peter Finley Dunne, Mr. Dooley on the Choice of Law,
4050 (edited by E. J. Bander) (Charlottesville: Michie Co., 1963).
4051 Quoted by Marc Galanter and Thomas Palay, Tournament of Lawyers,
4052 (Chicago, 1991), at 6. (Emphasis added.)

law firms and they also quote two great American lawyers from about the same period. In 1900, Robert L. Swaine, a founder of the Cravath, Swaine and Moore firm in New York, said, "the great corporate lawyers of the day drew their reputations more from their abilities in the conference room and facility for drafting documents than from their eloquence before the courts."²⁴⁴ In 1908, Roscoe Pound, who cared greatly about the reform of the legal system, noted the drift away from the courts. He said:

The leaders of American bars are not primarily practitioners in the courts. They are chiefly client caretakers. ... Their best work is done in the office, not in the forum. They devote themselves to study of the interests of particular clients, urging and defending those interests in all their varying forms, before legislature, councils, administrative boards and commissions quite as much as in the courts. Their interest centers wholly in an individual client or set of clients, not in the general administration of justice.²⁴⁵

²⁴⁴ Galanter and Palay, supra note __*, at 6.

²⁴⁵ Id. at 6-7.

4075 The growth of large American corporate law firms was,
4076 originally, reflective of the growth of American corporations.

4077 To the extent that there was litigation in these firms,
4078 it was litigation which was defensive, federal court based. Anti-
4079 trust litigation was acceptable, but tort litigation, family law
4080 practice was frowned upon. No one could afford to take on small
4081 cases. There was not much contact with state courts and not much
4082 interest in them. The litigation departments were largely
4083 subservient to the corporate lawyers. I have no research data on
4084 this, yet I have no doubt that this was the large corporate law
4085 firm mentality at the time I entered law practice and began to work
4086 with just such a firm.

4087 I believe that the development of the large law firm has
4088 diminished the influence of the judiciary. To a large corporate
4089 law firm partner of the 1960s, the period that Professor Marc
4090 Galanter identifies as the "golden era" of large law firm
4091 practice,²⁴⁶ there was some passing interest in the federal courts
4092 but almost none in the state courts. Even in Florida where I
4093 served in the state legislature and worked on judicial reform in
4094 the early 1970s, large law firms and the organized bar showed
4095 remarkably little interest in court reform.

4096 ²⁴⁶ Id. at 76.

4097 This shift of power from the courts to the corporate law
4098 firms had many consequences and one of the important ones was the
4099 change in focus of legal education. Law students began to look at
4100 career paths in large firms and with this focus, to turn away from
4101 the ideals of community service. The ambition of many young
4102 lawyers was not to be a public official or a judge, but to be a
4103 partner in a large firm.

4104 The prestige of courts, particularly courts in urban
4105 areas, diminished greatly. The downward spiral occasioned by such
4106 a loss of prestige, including relatively low salaries and a loss of
4107 attractiveness as a career path to bright young people, has harmed
4108 our court system.

4109 We talk much these days about the loss of professionalism
4110 and ascribe it to many causes. My view is that the decline in
4111 professionalism can be directly traced to the distance lawyers have
4112 moved from the courts and from their communities.

4113 My interest here is in the loss of connection by the bar
4114 and the loss of the spirit of public service. When I was a young
4115 lawyer, it was common to hear lawyers speak of being "called" to
4116 the bar. I don't hear that much anymore. When I was a young
4117 lawyer, we expected to be called by the judge's secretary or the
4118 clerk of the court and learn that we had been appointed to

4119 represent some person who could not afford counsel. Now our
4120 indigent defendants have a right to counsel and we have a public
4121 defender system. I don't get those calls anymore.

4122 But there are some changes.

4123 I talked earlier about the detachment of the large
4124 corporate law firms from litigation practice and from the courts
4125 and I tried to place that in a time perspective. This was the
4126 condition of corporate law practice when I entered it in 1962.
4127 That picture is changing today.

4128 The large and prosperous corporate law firms are now
4129 returning to courts. Business litigation has expanded greatly and
4130 with this litigation has come the renewed interest of these
4131 powerful institutions -- these great law firms -- in the courts.

4132 If the development of law practice in this century can be
4133 characterized by a law firm culture detached from (and even
4134 contemptuous of) courts, then our recent history has seen another
4135 swing of the pendulum led by the growth of litigation departments
4136 of the large corporate law firms.

4137 Any proposal for reform that ignores the realities of
4138 economics is doomed. The modern economics of large firm practice

4139 has shaken these institutions and made them look toward the courts.
4140 I believe that we are today at a juncture in our legal history, a
4141 time in which both courts and lawyers can be restored to their
4142 mission of public service.

4143 If this is to be accomplished, it is important that
4144 judges point the way and that public service and concerns for
4145 justice become a central part of what lawyers do. If we are to
4146 reform our legal institutions, including the powerful law firms, it
4147 seems likely to me that such reform will come from the courts.

4148 Before leaving the topic of large law firms, we should
4149 pause to look at the extraordinary story of Finley, Kumble, once
4150 the glamorous model for the law firm of the 1980's. If Walter
4151 Carter can be identified as the inventor of the modern law firm,
4152 Steve Kumble deserves credit for taking important variations on the
4153 Carter model to new lengths. Within a few years in the late 1970's
4154 and 1980's, Finley, Kumble grew from a rather small New York firm
4155 into a giant law firm of over 250 partners, 1,300 employees and 17
4156 officers; it was the fastest growing corporate law firm in an era
4157 of great growth.²⁴⁷

4158 ²⁴⁷ Kim Isaac Eisler, Shark Tank, (New York: St. Martin's
4159 Press 1990), and Steven J. Kumble and Kevin J. Lahart, Conduct
4160 Unbecoming (New York: Carroll & Graf, 1990).

4161 The development of the Finley, Kumble firm employed a
4162 variety of firm-building devices -- branch offices, recruitment of
4163 high profile lawyers who had business development potential, active
4164 "client development" efforts and great attention to lawyer
4165 "productivity." Finley, Kumble is, of course, an extreme example
4166 of the modern law firm. Its demise allows us a unique opportunity
4167 for autopsy.

4168 The autopsy reveals that many factors, such as
4169 overexpansion, an eagerness to develop business too rapidly, a
4170 culture which elevated the cult of rainmakers, emphasis on
4171 "productivity" while placing little value on community service, and
4172 a disregard for clients and partners, all combined to kill Finley,
4173 Kumble.²⁴⁸ Finley, Kumble died of greed.²⁴⁹

4174 Greed is harming other law firms as well. The complaint,
4175 heard since the turn of the century, about law "being a business"
4176 is now a common theme at most lawyer gatherings, yet there seems to
4177 be no clear strategy to deal with the complaint.

4178 ²⁴⁸ Kim Isaac Eisler, Shark Tank (New York: St. Martin's
4179 Press, 1990), pp. 202-220.

4180 ²⁴⁹ Sidney Zion's review of Steven Kumble's book, Conduct
4181 Unbecoming, says, "greed and the lust for power were the only
4182 reasons for the creation" of the firm. New York Times Book
4183 Review, "A Dangerous Species," Nov. 25, 1990, p. 27.

4184 While some law firms are beginning to think more about
4185 community service and "quality of life" issues, any real change
4186 will have to come from a more elaborate strategy. That strategy
4187 lies, I believe, in asking law firms to participate in
4188 comprehensive pro bono programs of the type described earlier and
4189 in convincing legal education that it now operates very largely in
4190 the service of large corporate law firms feeding bright young
4191 lawyers into these firms.

Chapter Eight

THOMAS JEFFERSON AND CHRISTOPHER COLUMBUS LANGDELL:
COMPETING VIEWS ON THE MISSION OF THE AMERICAN LAW SCHOOLS

Legal education has developed into a large and prosperous enterprise which produces lawyers in record numbers, but which has paid little attention to its history, its purpose or its role in society. We have already noted that lawyers play a large role in American society, and this role began well before legal education was organized into the university-based, post-graduate enterprise we now know. As Professor Paul Carrington has said:

In some states, particularly on the frontier, professional preparation was often left to self-instruction by those most endowed with wit, aggression and cunning, a system known to produce some astonishingly good lawyers, Abraham Lincoln being the premier example.²⁵⁰

Andrew Jackson and Abraham Lincoln, both lawyers, had no formal university legal education. Even Thomas Jefferson, who did receive training, would not qualify for bar admission under our present standards. But it was Jefferson who, as Governor of

²⁵⁰ Paul D. Carrington, "The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber," 42 J. Legal Education 339 (Sept., 1992).

Virginia, first envisioned university based American legal education.²⁵¹ He acted on that vision by creating a chair for his teacher, George Wythe, at the College of William and Mary.²⁵² As Professor Paul Carrington reminds us, Jefferson derived his legal education model from the way ministers were trained, and his purpose for legal education was "to teach law as a means of moral education."²⁵³ Jefferson's aim was "to inculcate republican virtue, those traits needed by public men to evoke public trust in public institutions."²⁵⁴ Modern law schools do not describe their mission in that way.

Before Jefferson's law school, early American legal education -- to the extent it existed at all -- was much more in line with the non-university based of British tradition.²⁵⁵ While

²⁵¹ Paul D. Carrington, "Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years," 41 Mercer L.Rev. 673 (1990).

²⁵² Id.

²⁵³ Id.

²⁵⁴ Id. at 673-74. Professor Carrington's exploration of early American legal education has continued with a recent article about another important figure who also concerned himself with public virtue. Paul D. Carrington, "The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber," 42 J. Legal Education 339 (Sept., 1992).

²⁵⁵ See Woodard, supra note __*, at 798-801 (generally describing eighteenth and nineteenth century legal education in England); see also Paul D. Carrington, "The Revolutionary Idea of University Legal Education," 31 Wm. & Mary L.Rev. 527, 532 (1990) (detailing how lawyers of Jefferson's day prepared themselves for

4220 British lawyers might benefit from taking a degree from one of the
4221 great universities, there was no perception that the university
4222 played a necessary role in educating lawyers or in the development
4223 of the law. As Professor Calvin Woodard states, "a deep-seated
4224 tradition was established that English law was not a university
4225 subject."²⁵⁶ The training of lawyers was done by the senior
4226 barristers and the Inns of Court and "was overwhelmingly practical,
4227 non-theoretical, and non-philosophical in character, being largely
4228 concerned with the technicalities of procedure and pleading."²⁵⁷

4229 John Mortimer's great character Horace Rumpole, the
4230 English criminal lawyer and self-styled "Old Bailey hack,"
4231 expressed this disconnection between the bar and the academy in his
4232 encounter with Professor Grice, the Oxford law don:

4233 The man to whom I was introduced was the
4234 most raven-like of all the dons. He had
4235 almost jet-black hair, hardly going grey,
4236 which also grew from his ears and on the back

4237 practice and elaborating upon Jefferson's own legal training).

4238 ²⁵⁶ Woodard, supra note __*, at 798-99.

4239 ²⁵⁷ Id. at 799.

4240 of his hands. He had strong yellow teeth.²⁵⁸

4241 "Rumpole of the Old Bailey," eh? How
4242 very amusing,' said the law tutor Grice.
4243 'What do you think of academic lawyers down at
4244 the Old Bailey?'

4245 'Well to tell you the truth,' I had to
4246 admit, 'we hardly think of them at all.'

4247 'But you'll have read my paper on "The
4248 Concept of Constructive Intent and Mens Rea in
4249 Murder and Manslaughter" in the Harvard Law
4250 Review?' Humphrey Grice looked puzzled and
4251 not a little hurt.

4252 'Oh rather!' I lied to him. 'Your
4253 average East End jury finds it absolutely
4254 riveting.'²⁵⁹

4255 It is against this background that Jefferson's idea seems

4256 ²⁵⁸ From this introduction we may guess that Mortimer, a
4257 distinguished barrister before and during much of his literary
4258 career, had a score to settle with someone.

4259 ²⁵⁹ John Mortimer, Rumpole for the Defense 53 (New York:
4260 Penguin Books, 1982).

4261 so revolutionary but, despite some early success,²⁶⁰ most American
4262 lawyers did not go to law school until well into the twentieth
4263 century. Much of the character of American lawyers came from the
4264 fact that law was a career available to the bright and ambitious
4265 young man on the frontier or in the new immigrant populations, and
4266 that access into the legal profession came from a process much less
4267 formal and rigid than that we know today.

4268 The great waves of immigration at the turn of the century
4269 were followed by dramatic increases later of foreign-born lawyers,
4270 especially in America's largest cities. Law schools began to grow,
4271 and increasingly came to be the place where lawyers were trained.
4272 In spite of often blatant discrimination at some law schools (Yale
4273 Law School limited the admission of Jewish students by quota from
4274 1922 to 1960),²⁶¹ the number of American lawyers from Jewish,
4275 Irish, Italian and other immigrant backgrounds increased
4276 dramatically during the first half of the 20th century.²⁶²
4277 Numerous urban law schools catered to these students, who often
4278 expected to establish practices serving people with the same ethnic

4279 ²⁶⁰ See Carrington, supra note __*, at 541-73 (tracing the
4280 development of early law schools).

4281 ²⁶¹ Abel, supra note __*, at 85.

4282 ²⁶² Id. (noting the increase of foreign-born lawyers and
4283 lawyers with foreign-born parents during the beginning of the
4284 twentieth century).

background.²⁶³ The proportion of lawyers in New York City who were first or second generation immigrants increased from 47 percent in 1900 to 69 percent in 1960.²⁶⁴ Success for these lawyers came from their involvement with their communities in which they lived and made their way.

But legal education has steadily changed, and bar associations, particularly the ABA, have pressed for higher standards, including standards which put exceptional pressure on night schools and part time programs.²⁶⁵ This pressure was paralleled by the pressure from the status-conscious academic world, which has literally sneered at law schools which accommodated working and other part time law students.

The success in establishing these standards did not mean that legal education has followed the pattern of medical education and its limited enrollment. Indeed, there is no graduate program which has prospered so much if we measure prosperity by enrollment figures. A look at the statistics of legal education show us the

²⁶³ See id. at 87 (noting, for example, that more than half the Jewish lawyers in the beginning of the twentieth century served a clientele that was more than half Jewish).

²⁶⁴ Id. at 86.

²⁶⁵ See, e.g., Charles D. Kelso, The 1990 ABA National Conference on Part-Time Legal Education (1991).

4308 great growth:²⁶⁶

4309 • In the 1939-40 academic year, there were 102 ABA
4310 accredited law schools. There were a total of
4311 22,661 law students in the United States.

4312 • In the 1989-90 academic year, there were 73 more
4313 law schools, a total of over 175. These are now
4314 large law schools, not the average size of 222, as
4315 in 1940, but an average size of over 700 students
4316 each. We now have 124,471 students enrolled in our
4317 law schools -- 6 times as many as in 1940.

4318 The role of the law schools, which were designed to
4319 displace the apprenticeship system, has, instead, merely delayed
4320 that system, extending the necessary years of education and
4321 affording a screening mechanism for those for whom apprentice
4322 services are to be rendered.

4323 Even in the early days of law schools, before the
4324 emergence of large law firms, the law graduate would enter law
4325 school expecting to go into a solo practice or perhaps join a
4326 relative or family friend. That's what most of them did. Of

4327 ²⁶⁶ [Need Source.]

4328 course, the single practitioner was the dominant model until after
4329 World War II.²⁶⁷ In those days, legal education gave the law
4330 student a basic education, the bar exam double checked the results,
4331 and lawyers put out their shingles for themselves or joined in
4332 practice with a few other lawyers.

4333 Today, law students do not go to such a practice. In
4334 overwhelming numbers, law graduates become employees upon
4335 graduation. Professor Abel reports that only 3% of law graduates
4336 go directly into practice for themselves.²⁶⁸ Of course, the
4337 percentage of lawyers in such a practice is steadily declining. In
4338 1948, 6 of 10 lawyers were in solo practice and today only 3 of
4339 10.²⁶⁹ The post-law school endeavor of law graduates, then, is
4340 overwhelmingly as the employee of some organization -- law firms,
4341 corporate counsel offices, government. The training of young
4342 lawyers originally moved from the apprenticeship system to the law
4343 schools and now has moved into a phase of law schools plus an
4344 apprenticeship at a large corporate law firm.

4345 The origin of the modern law school is generally credited

4346 ²⁶⁷ Abel, supra note __*, at 179 (noting that "[w]hile sole
4347 practitioners were twice as numerous as firm practitioners in 1948,
4348 the first category now is smaller than the second." (emphasis
4349 original)).

4350 ²⁶⁸ Id. at 238.

4351 ²⁶⁹ Id. at 181.

to the development of a teaching method -- the "scientific" case method pioneered by Dean Christopher Columbus Langdell at Harvard Law School late in the last century.²⁷⁰ This method was based on the idea that, since the opinions of appellate courts provided the basis for decision, study of the principles of law as applied to facts in these opinions would allow students to understand the law. This method was offered as an alternative to lectures on legal principles. The teaching method used a so-called "Socratic method" of inquiry into the court opinions and was probably an improvement on the straight lecture system. Students and professors engage in an interchange not unlike the interchange between a judge (particularly an appellate judge) and the lawyers. This teaching method spread through the country and came, over time, to be the accepted method at most law schools. It remains so today.

Christopher Columbus Langdell had practiced law but had not realized much joy or distinction in law practice. Jerome Frank called him a "neurotic escapist" and charged that he set legal education off on a course which led away from the practice of

²⁷⁰ Robert Stevens, Law School: Legal Education in America From the 1850s to the 1980s xv (1983) (noting the predominance of the Harvard Law School model in twentieth century legal education), at 52-56. Happily, Professor Carrington's work gives us another dimension on the earlier tradition. See Carrington, supra notes ____* and ____*.

4376 law.²⁷¹ One very important contribution of Langdell, criticized
4377 by Frank, was the idea that the law library should be at the center
4378 of the law school so that research and scientific study of law
4379 could be facilitated. Langdell's influence on law schools in this,
4380 as in other ways, cannot be doubted. Go to any law school and ask
4381 for a tour. Whatever else you may be shown, you are certain to be
4382 shown the library, and it is almost certain to be the single most
4383 impressive feature of the school and one of its most costly as well
4384 usually accounting for 15 to 20 percent of the law school budget.
4385 The assembly, storage, updating and administration of law library
4386 collections is an extremely expensive undertaking, and the presence
4387 of a law librarian on every law school ABA accreditation site
4388 inspection team assures that the pressure for further law library
4389 resources will continue. Many law school deans, struggling with
4390 tight budgets and eager to develop new programs, feel that
4391 pressure. One law school dean summed up his frustration by saying,
4392 "I would like to have a law school that the law library could be
4393 proud of." If you have had the tour of the library, you will
4394 understand. After that tour, ask for a tour of the clinical
4395 facilities and then compare the two. There are only a handful of
4396 law schools which provide as well for their students' clinical
4397 training as they do for their books. Yale Law School Clinical
4398 Director Stephen Wizner, referring to Jerome Frank's criticism of

4399 ²⁷¹ Jerome Frank, "A Plea for Lawyer-Schools," 56 Yale Law
4400 Journal 1303, 1304 (1947).

4401 Langdell, observes:²⁷²

4402 By ignoring the actual process of litigation,
4403 the case method provides the law student with
4404 only an academic view of the law. But the law
4405 does not exist in books; it ultimately exists
4406 in court cases between disputing parties.

4407 Frank's solution was for law schools to have practicing
4408 law offices in the law schools, and teaching programs which allow
4409 students to study the actual practice of law. He wanted to have
4410 law professors with experience in the practice of law. In this,
4411 too, he was at odds with Dean Langdell who introduced the prototype
4412 of the modern law professor -- the law professor without real
4413 experience in law practice. He said:

4414 A teacher of law should be a person who
4415 accompanies his pupils on a road which is new
4416 to them, but with which he is well acquainted
4417 from having often traveled it before. What
4418 qualifies a person, therefore, to teach law,
4419 is not experience in the work of a lawyer's
4420 office, not experience in dealing with men,

4421 ²⁷² Stephen Wizner, "What is a Law School?, 38 Emory Law
4422 Journal 701, 709 (1989).

not experience in the trial or argument of
cases, not experience, in short, in using law,
but experience in learning law.²⁷³

This highly dubious assertion was widely accepted,
perhaps, in part, due to the convenience of a model which allows
law schools to hire younger, less expensive faculty members. Law
schools developed faculties of relatively young and inexperienced
lawyers who earned tenure through their scholarship and, perhaps,
their teaching ability and public service. Legal education
embraced the large lecture classroom model and a teaching method
which relies on appellate opinions and classroom analysis of those
cases, a method which law professors often call "Socratic," but
which is better described as "Kingsfieldian," after the fictional
law professor of Paper Chase.²⁷⁴

The Langdell model worked. Law schools became recognized
as an academic discipline, developed further prestige as a graduate
program,²⁷⁵ and, finally came to be the sole practical method for

²⁷³ Stevens, supra note __*, at 38 (quoting Langdell).

²⁷⁴ Id. at 52-53 (discussing the Socratic method of the
Langdell model).

²⁷⁵ Many law schools operated a hybrid type program on into
the 1950's. These programs did not require a degree for entry into
law school, but typically, three years of undergraduate study. The
accreditation standards of the ABA still permit such programs. See
ABA, Standards for Approval of Law Schools S502 (1987).

4448 admission to the bar in most jurisdictions. The emergence of the
4449 law schools came at the same time as the United States' assertion
4450 as an industrial power and an international force. Professor
4451 Calvin Woodard places the law schools into that role:

4452 The rise of every great nation state
4453 entails the creation of new, or the adaptation
4454 of old, institutions to the means by which
4455 power is gained. The Prussian Empire rose to
4456 eminence through its army and its great civil
4457 service, both of which the Hohenzollerns
4458 radically reformed for that purpose and to
4459 that end. The British Empire rose to power
4460 through the strength of its navy and the
4461 drastic reformation of its ancient
4462 universities, Oxford and Cambridge, and public
4463 schools, thereby creating a class of civil
4464 servants and colonial administrators capable
4465 of governing strange peoples in strange lands
4466 around the world.

4467 The rise of the United States to its
4468 present eminence has been very largely
4469 accomplished by law-trained citizens who
4470 worked to implement the ideas of adventurous

businessmen and scientists: who helped social critics frame quixotic ideals into realistic reform measures, and who, though professionally committed to law, never forgot that law was not the end in itself.²⁷⁶

Law schools also contributed to the development of the law in very special ways, ways very different from that of British universities which remained detached from the practicing lawyer. Again, Professor Woodard:

The emergence of our modern university-based law schools did not come about as a natural consequence of our commitment to the common law tradition which has exerted such a formative influence on American law and legal institutions. To the contrary, it marks both a major break with, and the taking of a giant step beyond, the long-established pattern of legal education in England. Indeed, with the American law schools' rise to eminence, our law has increasingly taken on a distinctly

²⁷⁶ Calvin Woodard, "Justice Through Law -- Historical Dimensions of the American Law School," 34 J. Legal Educ. 345, 367 (1984).

4494 less English character, despite our continuing
4495 insistence that ours is a common law
4496 jurisdiction.²⁷⁷

4497 Professor Woodard makes the point that American legal
4498 education is exceptional, and that it has trained those who have
4499 helped to raise this country to its present eminence.²⁷⁸ It is
4500 difficult to embellish the assessment of Professor Woodard, but I
4501 should add some more particulars of law school accomplishments.
4502 The university-based law schools have helped to screen applicants
4503 into the legal profession, setting before the ambitious and bright
4504 person a considerable array of hurdles. The sheer length of legal
4505 education helps assure some level of commitment. The requirement
4506 of two degrees²⁷⁹ and a bar exam²⁸⁰ over a seven and one-half year

4507 ²⁷⁷ Woodard, supra note __*, at 798.

4508 ²⁷⁸ Id. at ?.

4509 ²⁷⁹ According to the ABA Accreditation Standards, a student
4510 may be admitted to law school if he or she has completed 3/4 of an
4511 undergraduate course. See ABA, supra Note __* (specifically
4512 providing the applicable text of Standard 502(a)). However, this
4513 is not allowed at most law schools. See ABA, A Review of Legal
4514 Education in the United States 4-63 (revealing that only twenty of
4515 the 176 ABA-approved law schools admit, as law degree candidates,
4516 persons with only three years of college).

4517 ²⁸⁰ Wisconsin is the only state which retains the "diploma
4518 privilege."

period²⁸¹ serves to weed out the lazy and the incompetent.²⁸² The development of a quasi-scientific screening test for law school admission has helped to assure the quality of law students.²⁸³

Law schools have also allowed American lawyers to have a common view of law in a country which is diverse. This point cannot be overemphasized, for law has been a unifying force in American society and, given the authority of our state legislatures

²⁸¹ By the time the bar exam is taken and graded, the law graduate has spent a number of months -- often as many as six -- in the bar exam process. This is the reason I calculate that legal education today takes 7 1/2 years.

²⁸² American law schools as they exist today are a relatively recent phenomena originating late in the last century. It was only after World War II that most lawyers were also graduates of law schools.

My own family history reflects this steady growth of legal education. One of my great grandfathers was a lawyer and judge, and he had no formal legal education; my grandfather became a lawyer with a background of only one year at a law school -- it was an undergraduate course then -- and my father went to several years of college before going to law school for two years. He did not graduate but he was allowed to take the bar exam. Had he finished law school, he would not have had to take the bar exam since law graduates from state universities were then accorded admission under the "diploma privilege."

By the time I entered the profession in 1962, thirty years after my father, most of the modern rules governing legal education were in place. I was required to have a four year degree before entering law school, to finish law school before I could take the bar exam. When we add to that the Law School Admissions Test requirement prior to admission we have, as Zorba the Greek said, "The full catastrophe."

²⁸³ See Abel, supra note __*, at 60 (discussing the increased reliance of the Law School Admissions Test to determine law school entry since 1947).

4554 and state court systems, it might not have developed this way.
4555 Much of the credit goes to American law schools which teach with
4556 similar methods using similar materials throughout the country.
4557 Law review articles have provided a significant check on judicial
4558 decision making and scholarly articles have frequently pointed to
4559 errors in opinions, to perils in certain doctrinal developments and
4560 even to sloppy consideration of facts.

4561 Law schools have provided a source of renewal to the
4562 law. Calvin Woodard points out that the American system of legal
4563 education has connected succeeding generations of lawyers, judges
4564 and legislators with the intellectual movements of Europe.²⁸⁴
4565 Into the vessel of the common law, Roscoe Pound and his disciples
4566 have poured the concepts of sociological jurisprudence. Justice
4567 Oliver Wendell Holmes was led to think afresh about free speech
4568 because he maintained contact with Professor Zachariah Chaffee, Jr.
4569 at Harvard Law School.²⁸⁵ The legal realists helped judges and
4570 lawyers put aside formalism. In recent years, the work of scholars
4571 in feminist legal theory and race theory have helped shape the
4572 development of the law.

4573 ²⁸⁴ Woodard, supra note __*, at 349-50.

4574 ²⁸⁵ Harvard Professor Zachariah Chaffee, Jr. wrote about
4575 freedom of speech in wartime and helped to shape Holmes' thinking
4576 about the doctrine of clear and present danger in context of free
4577 speech. Anthony Lewis, Make No Law 75 (1991).

The connection between the universities and the law has helped American law develop new legislative ideas, to accept worker's compensation and no-fault insurance. The bright young people who followed Franklin Roosevelt to Washington -- many of them lawyers and law professors who had studied other systems of social legislation and regulation -- helped shape government reforms.

The role of law professors in legal reform has also been felt in American law through the process of crafting statutory law at the state level. The work of the American Law Institute and the Commissioners for Uniform State Laws has been vital for the course of law reform in the states. Law professors have provided the expertise for these efforts, serving as reporters and drafters. The Uniform Commercial Code, crafted by Professor Karl Llewellyn, is now such a part of the American legal system that it is difficult to conceive how commercial lawyers could have operated without it.

The major reforms within the profession itself have frequently been energized by academic thought. Harvard Law Professor Frank Sander inspired the alternative dispute resolution movement with his 1976 speech on the "multi-door courthouse,"²⁸⁶

²⁸⁶ Frank Sander, "The Courthouse of Many Doors,"

4601 and the efforts to develop and modify lawyer and judicial ethics
4602 codes have drawn on academic lawyers. The work of law professors
4603 in continuing education programs for lawyers and judges has also
4604 been extremely important. The efforts by academic lawyers,
4605 particularly Professor (now Judge) Robert Keeton, led to the
4606 creation of the National Institute of Trial Advocacy, which has
4607 provided a dynamic teaching method, materials to support that
4608 method and training programs for teachers.

4609 As I assess the major accomplishments of American legal
4610 education, I conclude that it has contributed largely because
4611 American lawyers and American academic lawyers have been connected
4612 in important ways.

4613 This assessment of legal education, flattering as it is
4614 intended to be, will seem unsettling to many law professors who
4615 hold the contrary view, the view that disconnection from the
4616 profession has been the important factor in the success of American
4617 legal education and there are points to be made for detachment.
4618 Certainly, there is a danger in law professors becoming too much
4619 involved in law practice in ways which detract them from their
4620 principal mission. There is, indeed, a case to be made for law
4621 professors remaining aloof, but it is not a very good case.
4622 Nonetheless, legal education is aloof in ways I will try to
4623 develop.

4624 This emphasis on the separate role of legal educators
4625 becomes particularly important when it is asserted in the debate
4626 over the role of the law schools in teaching law students how to
4627 practice. Adherence to a teaching philosophy which holds that law
4628 schools' mission is not to teach students to be lawyers has
4629 certainly helped the development of law firms. Students are told
4630 baldly that they are not being trained for the practice of law,
4631 leading most law students to place themselves after graduation in
4632 an environment where they believe they can learn to practice law.
4633 Since students are warned that they will not be competent to
4634 practice law on their own, they become employees, they enter
4635 apprenticeships.

4636 We do not often pause to reflect on the impact on
4637 students of the often repeated statement of legal educators,
4638 usually phrased something like, "We don't teach you to be a lawyer,
4639 but only to think like a lawyer." Isn't this a strange statement?
4640 What if the graduate drama school were to deny that they were
4641 training actors, directors, set designers? What if the graduate
4642 music school declared that it did not intend to teach any
4643 performance skills? Should medical schools teach people to
4644 practice medicine? Should graduate history schools turn out
4645 practicing historians? What would we say to any of these educators
4646 who were to say that, "We don't teach you to be a (musician, actor,
4647 historian, physicist), but only to think like one?" When we place

4648 the attitude of American law schools beside that of all other
4649 graduate and professional education, we should ask ourselves
4650 whether our statements make any sense at all.²⁸⁷

4651 Professor Richard Abel suggests that one of the major
4652 purposes of legal education is to feed the new system of
4653 apprenticeships, the places where lawyers go after law school. In
4654 this function, which he calls, "allocation," the law school serves
4655 as a sorting device very much in the way a packing plant may
4656 classify meat or vegetables by size and quality. Professor Abel
4657 observes that "[t]he law school has assumed this responsibility --
4658 indeed, some would say that allocation, not education, is its
4659 raison d'être."²⁸⁸

4660 There are several mechanisms of this sorting process and
4661 other institutions play some role. At the first stage, the
4662 undergraduate programs at the universities conduct a screening

4663 ²⁸⁷ We know that the law schools are not training students
4664 for the bar exam and the ABA accreditation standards are clear on
4665 that. Standard 302(b) states that "[t]he law school may not offer
4666 to its students, for academic credit or as a condition to
4667 graduation, instruction that is designed as a bar examination
4668 review course." ABA, Standards for Approval of Law Schools S302
4669 (1987). This prohibition was well founded in an earlier time when
4670 law schools were not yet brought within the ABA model, when law
4671 students were not as well screened as they are today, when the
4672 resources of many law schools were even more sparse than today, and
4673 when bar examinations themselves were suspected of being sometimes
4674 slapdash, and perhaps too concentrated on the details of practice.

4675 ²⁸⁸ Abel, supra note __*, at 238.

function. This function goes back to the college SAT scores, which play such a large role in the decision of college admission processes. Once in a decently regarded undergraduate college, the potential law student faces two hurdles which will determine admission to law school -- grade point average and Law School Admission Test score. Both can be manipulated, both are unreliable and both are, in fact, relied on almost to the exclusion of any other factors in initial screening of law school applicants.²⁸⁹

In any event, even if we get a test score, the very people who administer it tell us not to rely on it. Here's what the Law School Admission Council tells us:

The LSAT, like any aptitude test, is not a perfect predictor of law school performance. The predictive power of an admission test is ultimately limited by many factors, such as the complexity of the skills the test is designed to measure, the imperfections in the variable the test tries to predict (i.e., law

²⁸⁹ See James D. Gordon III, "How Not To Succeed in Law School," 100 Yale L.J. 1679, 1684 (1991), quoted in "Secrets of the Bar! From School to Partnership, an Unauthorized Guide to the Law," quoted in The Washington Post, July 7, 1991, at B1 (satirically stating that "[w]hen the law school receives your applications, it banks your check, adds up your GPA and LSAT scores and throws the rest of the application away. No sane admissions officer is going to wade through 6,000 personal statements.").

4702 schools using different measures to assess law
4703 school performance), and the unmeasurable
4704 factors that can affect students' performances
4705 (i.e., motivation, physical and mental health,
4706 or work and family responsibilities). In
4707 spite of these factors that interfere with
4708 precise predictions, the LSAT compares very
4709 favorably with admission tests used in other
4710 graduate and professional fields of study.²⁹⁰

4711 Law schools don't pay much attention to these
4712 disclaimers. The computers at the Law School Admissions Services
4713 churn the numbers and produce for the law school admission indices,
4714 a numbers analysis. The students who have the best numbers, that
4715 is, LSAT and grade point average, survive the process. Of course,
4716 there are always the "gray area" students, the waiting lists and
4717 the discussions of the admissions committee, but all of this
4718 functions within very narrow boundaries and those boundaries are
4719 set by LSAT scores and grade point average.

4720 If this is essentially correct for most law schools, and
4721 I believe it is, then the process of screening up to this point
4722 does not take into account any of the fine character traits which

4723 ²⁹⁰ Law School Admission Council/Law School Admission
4724 Services, Information Book, 1991-92 125 (1991) (emphasis original).

lawyers so proudly associate with their profession. Traits such as honesty, diligence and concern for public policy are not taken into consideration unless the applicant falls within the gray area. As former Temple University law dean Peter Liacouras put it:

What the LSAT does not even purport to measure . . . turns out to be so much of what does count in lawyering and good community leadership: common sense, self-discipline, motivation, judgment, practicality, idealism, tenacity, fidelity, character and maturity, integrity, patience, preparation, the ability to listen, perseverance, client-handling, creativity, courage, personality, oral skills, organizational ability and leadership.²⁹¹

Nor does it touch on skills many think essential for lawyers, such as speaking skills, writing skills and interpersonal skills.

When the applicant is admitted to law school, whether it is to one of the sixty law schools which rank themselves in the top twenty, or just a decent law school in a fairly prosperous state, the path is still, in theory, largely open to everyone to get a top

²⁹¹ Quoted in _____, New York Times, _____.

4746 ranking in the "allocation" system. There is a large demand in the
4747 law firms, occasioned by high turnover and the expanding size of
4748 the firms for recent law school graduates. For reasons obvious to
4749 everyone familiar with law firm culture, the basic model is one of
4750 a pyramid or a series of pyramids. The senior partners provide
4751 work for the associates and the associates provide the margin of
4752 value over their salary and overhead to support the partners'
4753 salaries. Not all law firms are equal in their clientele and their
4754 ability to bill clients for special services. Therefore, we have
4755 very different salaries paid to young lawyers, depending on the
4756 firm's practice, its geography and its culture.

4757 It cannot be doubted that this allocation function of
4758 legal education is extremely efficient. The sorting is very neat
4759 -- a student is either on law review or not, class standing is
4760 stated with precision at most law schools -- and, moreover, the law
4761 school socializes the student to want to be sorted, a point I hope
4762 to develop shortly. The sorting is done quite early, usually in
4763 the first year for the top students and by the end of the second
4764 year for the rest of the class. Those without jobs or prospects in
4765 the third year will rarely have an opportunity at the so-called
4766 "top" jobs.

4767 If allocation is the function of American legal
4768 education, we must concede that legal education is an outstanding

4769 success. This success, however, benefits large corporate law firms
4770 and law schools and not the majority of law students or the
4771 community at large.

4772 Lawyers and law schools have never realized such material
4773 success. We are prosperous, we have power. When I look at legal
4774 education from the prospective of a large corporate law firm
4775 attorney, I take great comfort in knowing that there are high
4776 quality students being recruited to law schools and socialized for
4777 practice in a corporate setting. I feel particular gratitude to
4778 the law schools for the excellent function of "sorting." By
4779 categorizing the student, once again based solely on the academic
4780 numbers he/she posted in their first year and without any
4781 consideration of other factors, law schools simplify the law firm's
4782 recruitment process by allowing the recruiter to limit interviewing
4783 to the law review members with high grades.

4784 However, when I think about legal education from the
4785 standpoint of law students I say to myself as a sometimes law
4786 professor: I ought to be ashamed of the system which does not
4787 prepare students for their profession, does not provide them with
4788 adequate career alternatives and does not prepare them for public
4789 service. I am not a great believer in conspiracy theories, but we
4790 could construct a fairly decent case that legal education has been
4791 in league with large law firms for some time and that cartel has

4792 not had justice as its primary goal.

4793 Let me try to make the conspiracy case:

4794 By screening law students and sorting them out, legal
4795 educators ease the burden of selection for law firms. By
4796 socializing law students to think that they should go where the
4797 "interesting work" is, we precondition them to accept this
4798 employment. By telling them that they will only learn to "think
4799 like lawyers" in law school and they must go elsewhere to learn to
4800 practice law, we drive students to places where they believe they
4801 will get the best training and where they will have the greatest
4802 future alternatives. And, by extending their education and
4803 inhibiting their earning capacity,²⁹² we force them further into
4804 debt and push them towards the highest paying jobs.

4805 If this is a conspiracy, what benefit do law professors
4806 receive from this arrangement?

4807 They (we) get the large class teaching method and an
4808 education system which burdens us least. A system of great

4809 ²⁹² The ABA standards, as interpreted, limit law students
4810 carrying a full academic load to no more than twenty hours of work
4811 a week. Standards also exist that prohibit law students from
4812 earning college credit and income at the same time. Such
4813 restrictions are not applied to other disciplines, such as medical
4814 education.

4815 prestige, decent pay and enough leisure time to pursue interests
4816 other than teaching. Our teaching itself is mostly satisfying, for
4817 we teach subjects we personally want to teach and our students are
4818 among the very best in our society.

4819 The law schools and the large law firms have thrived on
4820 the "Paper Chase" model. Christopher Columbus Langdell's
4821 antiseptic vision of legal education as a detached and "scientific"
4822 enterprise has prevailed over Thomas Jefferson's notion of
4823 university-based legal education with a mission to teach republican
4824 virtue. The limited mission of teaching students to "think like
4825 lawyers" is far from the vision of Mr. Jefferson, who originated
4826 the idea of a university-based legal education.

4827 Law schools are not fulfilling the mission which I will,
4828 without apology, call the seminary mission.²⁹³ They are not
4829 teaching law students about justice, they are not preparing them
4830 for a life of "republican virtue." They are not even preparing
4831 them to practice law. The corporate law firm sorting function is
4832 not acceptable as a rationale for legal education. The law school
4833 detachment from the mission of training lawyers and the cynical
4834 character of much of legal education is understood only upon

4835 ²⁹³ Professor Carrington reports that this idea of a law
4836 school to train a "secular clergy" was embraced by the Hamiltonian
4837 James Kent, the first law professor of Columbia. Paul D.
4838 Carrington, footnote _____, supra, p. 341.

4839 walking through the law student's experience.

Chapter Nine

THE STUDENT'S EXPERIENCE

When compared with other systems of legal education, education for lawyers in the United States is longer for students, more rewarding financially for the average law professor, more profitable (or, at least, less unprofitable) for universities than most other forms of graduate education and very much focused on a single skill -- legal analysis. Let me begin with some generalizations about how legal education works from the perspective of the typical talented, ambitious student -- the kind of young men and women law schools have wanted to attract to the profession for decades -- and are getting in large numbers today.

The Admissions Process.

Students who want to go on to law school learn early as undergraduates that admission to law school, especially the most prestigious ones, rests largely on two factors -- undergraduate grade point average and LSAT score. To ambitious undergraduates who calculate their chances for admission to law school, this means that they must excel in required core courses, then select a major, minor and elective courses which can produce the highest possible grades with the minimum risk of failure and avoid any courses which, although intellectually stimulating, may result in a lower

4862 grade.

4863 A legal educator who has been dean of two law schools and
4864 President of the Law School Admission Council once made this point
4865 in a very dramatic form. He asked a group of law professors to
4866 honestly assess the advice they would give to a student who asked,
4867 not for opinions on the best course of study for an undergraduate
4868 who wanted to become a lawyer but, rather, the course of study they
4869 would advise for a student who sought the path most likely to
4870 achieve admission to law school. I can only paraphrase, but his
4871 essential points were that, given that question, we would urge the
4872 student to enroll in the courses which were the most likely to
4873 produce high grades regardless of their educational content; we
4874 would advise avoidance of all extracurricular activities which
4875 might distract from study of these "gut" courses; and we would
4876 advise the student to take the review course several times before
4877 submitting to the Law School Admission Test. Of the forty or so
4878 deans and professors present, there was no dispute.²⁹⁴

4879 When students prepare for the LSAT, they increasingly
4880 choose to take a review course -- then take the exam during the

4881 ²⁹⁴ I have learned that some clever applicants also take the
4882 LSAT once, but then cancel their request for grades. Under the
4883 rules of the Law School Admissions Council, that first test score
4884 is never tabulated and no record is made. The student gets
4885 accustomed to the test and its pressure, perhaps retakes a
4886 preparation course and then sits for the test.

4887 summer of their junior year. This leaves an opportunity for the
4888 test to be retaken if the score does not reach the student's
4889 expectation. The Law School Admissions Service then reports the
4890 results -- combining the LSAT score with grade point average,
4891 perhaps factoring the perceived quality of the undergraduate
4892 school. Law schools use these numbers very largely as the basis
4893 for admissions decisions. Rare is the law school which screens
4894 applicants for such personal qualities as diligence, concern for
4895 others, and leadership -- or such skills as writing and
4896 imagination. In fact, with few exceptions, law schools do not
4897 interview prospective students.

4898 The law school admission process signals that law schools
4899 are looking only for academic ability as demonstrated in grades and
4900 LSAT scores. As a popular guide to law schools put it, the
4901 reliance on numbers "implies that law schools are interested only
4902 in whether or not you can cut the academic mustard, not the kind of
4903 person you are."²⁹⁵ There is nothing about the admissions process
4904 which indicates that public service, dedication to ethical
4905 principles or other virtues extolled in lawyer's speeches is
4906 greatly valued by the law schools.

4908 Law Students and The "Sorting" Function.

4909 Once admitted, first year law students learn quickly that
4910 their goal is to squeeze through the narrow door that admits them
4911 to the high income, high prestige world of corporate practice,
4912 where they will advocate the interests of big business and wealthy
4913 clients. This door is commonly framed by grades and law review
4914 experience as many law firms use such credentials as the basis for
4915 determining whether to grant or deny an interview to the applicant.

4916 The pool for hiring at large, "prestigious" law firms is
4917 now made up of the students who are selected to be summer clerks at
4918 the firm. Thus, the selection to be a summer clerk is
4919 determinative for most of the "best" jobs. To get an interview for
4920 these jobs, the students learn from professors and fellow students
4921 they should strive for good grades during their first year and be
4922 accepted to law review and/or moot court.²⁹⁶ Good grades and good
4923 co-curricular records get a student to the interviews. If the
4924 "top" student does not alienate all the interviewers, a summer job
4925 offer will be forthcoming. If a student performs reasonably well
4926 during their summer clerkship, given a good economic climate, they
4927 will most likely receive a permanent job offer.

4928 ²⁹⁶ Many of the law school co-curricular activities are
4929 available principally on the basis of grades although there are
4930 increasing numbers of law reviews which sponsor a writing
4931 competition as at least an alternative route to selection.

4932 When does the hiring of summer clerks for the end of the
4933 second year take place? Obviously, this has to take place in the
4934 second year based solely on the accomplishments of students during
4935 their first year.

4936 Since first year grades are the basis of the law firms'
4937 decision in selecting students for the important summer law firm
4938 clerkship, students learn that getting the "right" summer clerkship
4939 requires them to compete with fellow students for the highest
4940 grades in first year courses. The law school communicates in many
4941 ways to law students that success at law school is in achieving
4942 high grades, making law review and getting a summer clerkship job
4943 with a large corporate law firm. This is the path that the best
4944 students in the upper classes have taken and the message is not
4945 missed when, early in the Fall of their first year, some second
4946 year law students begin to show up in coats and ties rather than
4947 sandals and t-shirts. The 1L quickly learns that the people who
4948 are being interviewed by the "best" firms, taken to dinner, and
4949 invited to "fly backs" to interesting places are the law review
4950 members and a handful of others.

4951 Professor Richard Abel's American Lawyers notes that law
4952 firm interviews have become so disruptive to the fall semester
4953 class routine that some schools simply give up and suspend classes

4954 for a week.²⁹⁷ In Anarchy and Elegance, a journalist who spent a
4955 year at Yale Law School describes the impact of the interviewing
4956 process on legal studies at Yale.²⁹⁸ Yale has the type of Fall
4957 break described by Professor Abel, which "exists solely for
4958 employment reasons. The Yale Law School administration concluded
4959 that there is little point in holding classes when half the student
4960 body is scattered across the country being sold the pleasures of a
4961 hardworking, high-paying legal career."²⁹⁹ Goodrich concludes,
4962 "[t]he term fall recess is a misnomer and but one example of the
4963 ways in which corporate law has come to dominate legal education in
4964 recent years."³⁰⁰ Yale Professor Michael Graetz has coined the
4965 phrase "pigs in space" to describe the law students who go on "fly
4966 backs" to law firms and, stuffed with lavish meals, jet back to
4967 school from their interviews.³⁰¹

4968 For students, especially the top students, law schools
4969 serve the role of credentialing them for entry to the large law
4970 firms. As one Stanford Law School student put it: "What this place
4971 offers is a ritzy degree, and there's a legal requirement that you

4972 ²⁹⁷ Abel, supra note __*, at 215.

4973 ²⁹⁸ Chris Goodrich, Anarchy and Elegance (Little, Brown &
4974 Co., 1991).

4975 ²⁹⁹ Id. at 126.

4976 ³⁰⁰ Id.

4977 ³⁰¹ Id. at 131.

4978 spend three years here to get it."³⁰² New York Times legal
4979 correspondent David Margolick observed that students often regard
4980 the cost of this schooling more as a licensing fee.³⁰³

4981 Success equals good grades. Success is law review.
4982 Success becomes the large law firm.

4983 Law schools are very good at this sorting game and it
4984 yields up neat figures for the law firm to use (a gradepoint of 3.2
4985 beats a 3.1, class standing of 7 is better than a standing of 20).
4986 The law firms screening applicants swallow these numbers with the
4987 same eagerness that the law schools screening applicants accept the
4988 gradepoint averages and the LSAT scores.

4989 Having succeeded in first year courses, perhaps selected
4990 for law review or moot court team,³⁰⁴ the successful student can
4991 concentrate in the second year on interviewing with large law
4992 firms. In the Fall of the second year, law firms send recruiting
4993 brochures, followed by hiring partners to conduct interviews, host

4994 ³⁰² David Margolick, "The Trouble With America's Law
4995 Schools," N.Y. Times, May 22, 1983, at section 6, p. 21.

4996 ³⁰³ Id.

4997 ³⁰⁴ The most prestigious co-curricular activities are limited
4998 and the competition for membership is intense. Those who succeed
4999 in making law review are fairly well assured that they will get the
5000 best job offers. Law review membership is usually made based on
5001 first year grades or writing performance in the first year.

5002 receptions and dinners, and select students for "fly backs" to the
5003 firm, where further screening takes place.³⁰⁵

5004 Once recruited as a "summer clerk," the students are
5005 treated well. Over the summer months, they are taken to lunch,
5006 invited to firm social functions and invited to sit in on
5007 interesting hearings or transactions. Students who perform well in
5008 summer clerkships can expect to be invited to join the firm. In
5009 this process, many law students have their career decision made
5010 early in their third year. In practical terms, the decision for
5011 the people who are offered and take summer clerkships is actually
5012 made at that time.

5013 Sadly, law students are not very sophisticated in their
5014 decisions, and they are very likely to accept the highest salary
5015 offer without much regard for perhaps more important factors. One
5016 of the great failures of American legal education is its failure to
5017 provide adequate counselling to law students as they look at their
5018 career options. Students are not even given much guidance on the
5019 basic economics of the decision. It is fairly obvious that the
5020 real economic value of a salary in New York is worth much less than
5021 the same salary in a place with lesser taxes, housing costs,

5022 ³⁰⁵ At some schools, this process actually begins in the
5023 first year with some law firms seeking clerks to work in the summer
5024 after their first year.

utility costs, insurance costs, etc. But law students often fail to closely examine such points, and law schools do little to assist them. Dean Jack Kramer of the Tulane University College of Law compared starting associate salaries and costs of living in 1987. He found that graduates could achieve higher "real" starting salaries by turning down offers from New York City firms, and instead joining firms in such other cities as Cleveland, Houston, Dallas, or Chicago.³⁰⁶ While average starting salaries of \$46,000 in New York City is higher than \$45,000 in Cleveland or \$35,000 in Houston,³⁰⁷ Dean Kramer demonstrates that the "real" salaries would be \$8,400 higher in Cleveland and \$4,100 higher in Houston.³⁰⁸ Moreover, law schools typically fail to address important "quality of life" issues, such as family leave policies, pro bono policies and real mentoring opportunities.

In the third year, the top students who have accepted job offers may not feel the need to attend class or more commonly have learned that they can get by without daily class preparation. Students who diligently "briefed" the cases on their own during the first two years now turn to published case summaries or to locally

³⁰⁶ John Kramer, "Who Will Pay the Piper," 39 J. Legal Educ. 681 (1989) (providing table of real average salary differentials).

³⁰⁷ Id. at 677 (providing table that includes average starting salaries for associates).

³⁰⁸ Id. at 681.

5049 produced "heirlooms," detailed outlines of the professor's
5050 lectures, many of which include the unchanging jokes. Students
5051 have learned which professors to avoid and often select a course
5052 schedule which will accommodate their outside interests. The
5053 chosen turn their energies to law review or moot court. Others
5054 clerk for some local firm or simply engage in non-legal hobbies
5055 they find intellectually stimulating. Faculty members reciprocate
5056 by not expecting much from them. Class attendance drops and class
5057 participation, even for those who attend, reaches a low point.

5058 If we look at this picture from the perspective of the
5059 majority of American law students who did not get summer clerkships
5060 with large corporate firms, we see another picture. By the middle
5061 of their second year, law firm hiring partners have already
5062 screened the top students and made their selections. They have
5063 little interest in the rest of the students, or in second and third
5064 year course results.

5065 The firms consider the students already passed over for
5066 summer positions as a nuisance, yet the flood of resumes must be
5067 acknowledged and the occasional drop-in dealt with courteously.
5068 For those passed over, the job search for them can be long, lonely
5069 and dispiriting.

5070 Those students are the ones most likely to "clerk" with

local law firms during their second and third years and to be preoccupied with their employment future. The placement office is not very helpful to them and law school is not preparing them for practice on their own. Where law school clinical programs operate through placements with ongoing law practice -- typically government offices -- law students without assured job opportunities view these as potential career opportunities.

The Law Student and The Law School Curriculum.

The law student's experience with course work will vary greatly from school to school and is very much dependent on the quality of the teachers assigned, but several features are common to most law schools making it very likely that law students will have similar first and second year courses at any law school. E. Gordon Gee and Donald Jackson did a 1974 study which showed that seven courses were required of students in most schools: contracts, torts, civil procedure, criminal law, property, constitutional law, legal ethics and legal research and writing.³⁰⁹ Except for legal research writing and legal ethics,

³⁰⁹ E. Gordon Gee & Donald Jackson, "Bridging the Gap: Legal Education and Lawyer Competency," 1977 B.Y.U. L.R. 695, 843 (1977). The percentage of law schools requiring these courses was between 75% and 100%. Id. at ____.

5093 those are the core courses for virtually all bar exams.³¹⁰

5094 The teaching techniques employed in most law schools are
5095 likewise very similar. In asserting this, I do not argue that a
5096 sameness exists in classroom dialogue, but rather that the much
5097 touted (and much criticized) "Socratic method" is widely employed
5098 in the teaching of courses, particularly in the first two years of
5099 law school, where it is too often used in a large class lecture
5100 hall environment with the special dynamics of student terror not
5101 entirely exaggerated in the book and movie, Paper Chase.

5102 The teaching model in legal education is very much at
5103 odds with the rest of graduate and professional education which
5104 teaches in much smaller classes. The comparison is rather obvious,
5105 but it is a little difficult to discuss because law schools are
5106 organized in a structure so different from all other graduate and
5107 professional programs. Law schools function as a free standing
5108 graduate school without any attached undergraduate program and the
5109 student/faculty ratios of law schools cannot be readily compared
5110 with graduate history, physics or English programs. Average class
5111 sizes, however, illustrate interesting differences between law

5112 ³¹⁰ See, e.g., Florida Board of Bar Examiners, Rules of the
5113 Supreme Court of Florida Relating to Admissions to the Bar art. VI,
5114 §1(c) (providing that the Florida Bar Examination shall embrace
5115 Florida civil and criminal procedure and may embrace, inter alia,
5116 federal constitutional law, real property, torts, criminal law, and
5117 contracts).

5118 schools and other disciplines. The very best law school figures do
5119 not rate well with the high figures of other disciplines. Law
5120 school average class sizes do not approach the other "performing"
5121 academic graduate programs -- music and drama, for instance,³¹¹
5122 nor do law school class sizes allow the tutoring found in graduate
5123 programs in history, English, the social sciences, the "pure"
5124 sciences. Moreover, legal education is designed very differently
5125 from the business graduate programs where the average class sizes
5126 are usually no more than ten or twelve.³¹² Other professional
5127 schools that involve clinical education and actual patient or
5128 client contact are not easily compared to the very different
5129 teaching atmosphere in law school.

5130 In several speeches to people familiar with graduate
5131 education, I have sought to illustrate the problem of law school
5132 class sizes by giving my version of a "Checkers" speech, using a
5133 large box of checkers. I ask members of the audience to help me by
5134 identifying their knowledge and experience with graduate education

5135 ³¹¹ Teaching someone to play an oboe or act a scene from a
5136 play necessarily involves teaching close-in with small classes,
5137 individual training. Teaching someone to negotiate or draft a
5138 pleading or negotiate a settlement requires similar attention.

5139 ³¹² I acknowledge that average class size figures may hide
5140 some very large classes. It is my understanding that even medical
5141 education employs very large classes at some stages of education,
5142 but all other graduate programs feature some measure of closely
5143 supervised work for all its students. Law schools offer this
5144 experience to only some of its students.

5145 and even terminal degree professional education at the college and
5146 community college level.

5147 I ask people familiar with these other programs to stack
5148 up the checkers to represent the average class size. Typically,
5149 three checkers will represent music graduate programs; four for
5150 graduate chemistry and physics; five or six for English and
5151 history; four to eight for nursing (undergraduate or community
5152 college); and eight to ten for graduate business school.³¹³

5153 The person stacking checkers to represent the average
5154 class size for law school should end up with a stack of twenty to
5155 thirty checkers, even for very good law schools. As that stack
5156 gets higher and higher, the checkers are likely to fall. Perhaps
5157 this example should serve as a message to legal educators.
5158 American legal education is so different from every other graduate
5159 school discipline in the teaching method and the teaching resources
5160 that we ought to ask ourselves: Who is out of step?

5161 There are many consequences of the law schools' teaching
5162 architecture. Contact between most students and professors is at
5163 a minimum. Opportunities to critique and counsel is almost non-

5164 ³¹³ This exercise could be continued to include terminal
5165 degree programs at the community college level in such programs as
5166 dental hygiene and x-ray technician.

5167 existent for most students and there is no opportunity to learn
5168 through frequent testing and evaluation.

5169 Every time I have tried to make this point about the
5170 shortage of teaching resources in legal education, some law
5171 professor with an advanced degree in another discipline will tell
5172 me that legal education is more stimulating and more intellectually
5173 rigorous than other graduate programs. This may be true, but there
5174 is no reason to think that a law school's ability to provide a
5175 stimulating and rigorous education would be diluted by reducing
5176 class size. Indeed, there is every reason to think that legal
5177 education would benefit by reducing class sizes. We certainly know
5178 that we cannot teach the full range of lawyering skills in a large
5179 class format any more than the music school can teach someone to
5180 play the oboe in a class of one hundred and fifty.

5181 The Dominant Theme of Legal Education.

5182 If the law school curriculum is taught in a way which
5183 does not allow much individual instruction, the skills taught
5184 cluster around a relatively small part of lawyering skills -- the
5185 skill of detached analysis. Most of what I have to say on this has
5186 been said better by others but it should be repeated as we look at
5187 the experience of the typical law student. Chris Goodrich, the
5188 journalist who spent a year at Yale Law School, writes:

5189 My year in law school convinced me that legal
5190 education has a way of replacing everyday
5191 human values with what I can only call "legal"
5192 values -- values that sustain the system of
5193 law rather than the people that system was
5194 created to serve. Law schools commonly boast
5195 that they teach students to "think like
5196 lawyers," but I learned that some important
5197 things are lost, to both the culture and the
5198 individual, in the course of this intellectual
5199 transformation. Legal training doesn't create
5200 selfish, aggressive people -- but it does
5201 provide the intellectual equipment with which
5202 recipients can justify and give force to
5203 beliefs and actions most people would
5204 wholeheartedly condemn.³¹⁴

5205 These observations by Goodrich must be understood in
5206 context of what the law school is attempting to do. Under the
5207 direction of the legal realists, legal education intends to teach
5208 detachment and skepticism. Law schools are successful in their
5209 efforts to teach students "how to think like a lawyer," and
5210 Professor Karl Llewellyn warned that the process involves

5211 ³¹⁴ Goodrich, supra, note __*, at 4.

5212 "sacrificing some humanity first."³¹⁵

5213 Law Students and the Bar Exam Experience.

5214 After law school comes the bar exam, which covers
5215 subjects studied in the first and second year -- subjects long
5216 faded in students' memories. This makes it crucial to pay for a
5217 bar review course to refresh skills and organize an intensive study
5218 regime. Once taken by only a minority of law school graduates, bar
5219 review courses now attract nearly all students who intend to take
5220 a bar exam.

5221 The review course involves months of study, plus
5222 significant additional expenses -- so much so that it has become
5223 the virtual seventh semester of law school. Bar review courses
5224 have become so much a fact of life that some commercial student
5225 loan programs now will finance bar review courses, just as they
5226 finance the formal law school program.

5227 Even the bar exam experience is likely to differ for law
5228 graduates. Those who were hired by large law firms after summer
5229 clerkships return to an environment they know and usually are
5230 supported while they take the bar review courses and the bar exam.

5231 ³¹⁵ Karl Llewellyn, The Bramble Bush 101 (Dobbs-Ferry, New
5232 York: 1960).

5233 Others must pay for the review course and often support themselves
5234 while preparing for the exam.

5235 Diploma in hand, bar exam passed, associate position
5236 assured, the successful young men or women count on a life of
5237 affluence, prestige and influence. Although recent cutbacks at law
5238 firms have cast some doubt on these expectations, the top law
5239 students can "bank" on this career path. As we have already noted,
5240 however, they should not necessarily count on happiness.

5241 A cynic would say law schools have become marvelous way
5242 stations for some young people on their route to high-paying jobs
5243 in corporate law firms. The schools serve these firms well by
5244 sorting through the students, identifying the best prospects and
5245 delivering them to their offices.

5246 But the value to the larger aims, especially in helping
5247 to meet the goal of the profession to serve the public and system
5248 of justice, of our society is in question. Harvard's Derek Bok
5249 stated an extreme case when he wrote: "Law schools assist in a
5250 massive diversion of exceptional talent into pursuits that often
5251 add little to the growth of the economy, the pursuit of culture or
5252 the enhancement of the human spirit."³¹⁶ I would not go as far

5253 ³¹⁶ Margolick, supra note __*, at 21.

as President Bok (particularly on his "growth of the economy" comment), but I do agree that legal education has not met its potential.

I do not suggest that law schools have failed. Indeed, I have already tried to identify some of the many successes in an earlier chapter. Presently, however, I want to focus on the success of the law schools in helping to shape the labor market for lawyers (the "sorting function") and the consequences of that success. Law schools have become virtual "hiring halls" to which large law firms send recruiters to interview the most successful students, serving a function very similar to the "shape-up" of the labor hiring hall depicted in the classic film, "On the Waterfront."

Professor Henry Rose has lamented this state of affairs:³¹⁷

One of the tragedies of American legal education is the socialization of students to work in profitable practice settings. Many students are attracted to law school because of important moral, political or social

³¹⁷ Henry Rose, "Law Schools are Failing to Teach Students to Do Good," Chicago Tribune, July 11, 1990, Sec. 1, p. 17.

5276 values. They view a legal career as an
5277 opportunity to contribute to society.
5278 However, these aspirations are subverted
5279 rather than supported by legal education. The
5280 subliminal message of their training is clear
5281 to most students: "Real" lawyers work in
5282 large firms representing corporate and
5283 affluent clients.

5284 Law schools measure their success by how many
5285 of their graduates are placed in these
5286 megafirms. In the last decade, the percentage
5287 of graduates of American law schools who enter
5288 public interest jobs has declined by half.
5289 Thus is a new phenomenon established:
5290 Students enter law schools wanting to do good
5291 and leave wanting to do well.

5292 The corporate law firms determine which students will
5293 become the highest-paid beginning lawyers in the world by
5294 evaluating an applicant's first year course grades, law review
5295 selection and other first year achievements. This vastly
5296 simplifies the challenge of firms to find the most talented new
5297 employees. The law firms are almost indifferent to specific course
5298 content beyond the traditional core subjects, preferring to train

new hires in the specialized skills and knowledge suited for the
firm's needs.³¹⁸

As a corollary, law schools offer a progressively less
demanding curriculum which allows students to turn their attention
to job hunting, outside employment, law review, moot court and
other activities in the second and third year.

Students become increasingly engaged in these other
enterprises. They know that, after the first year, most of the
content of bar exams has been covered and that first year grades
are those most crucial to law firm recruiters. They assume that
the most useful learning will take place later in firm-sponsored
training courses and on-the-job experience.

In fact, law schools speak with pride about the high rate
of students already placed after their first year. As a popular
guide to law schools stated about one prestigious school:

After a hectic autumn interviewing season,
second year consists of going through the
motions. And except for a faculty-supervised

³¹⁸ There are some signs that this attitude is changing and
the change probably reflects the law firm's realization that proper
training is very expensive and that young lawyers no longer feel
bound to these law firms for long periods.

5321 paper and the occasional stimulating seminar,
5322 the only point of third year seems to be to
5323 prevent the second year from being the
5324 last.³¹⁹

5325 Finally, law professors benefit from the role of their
5326 schools in offering research opportunities and relatively light
5327 teaching responsibilities. By relying on large lecture courses,
5328 law schools structure a program in which teachers have much less
5329 contact with students than teachers in other graduate programs.
5330 Think about the contact between students and teachers in medicine,
5331 or graduate physics, English or social work.³²⁰

5332 Let's look now at what law schools do not do. Most
5333 prominently, law schools do not prepare students to practice law.
5334 The schools rely on the case method, which has endured throughout
5335 the 20th century as the teaching norm, despite repeated efforts to
5336 displace it, or at least contain its use. Although useful to a
5337 point, reliance on the case method results in law schools which
5338 teach the skill of legal reasoning, a valuable skill, but only one
5339 of the important skills of lawyers.

5340 ³¹⁹ [Need Source.]

5341 ³²⁰ The situation brings to mind a paraphrase of an
5342 oft-quoted statement of workers in former Soviet-bloc nations. Law
5343 students might say about their relationship to the faculty, "We
5344 pretend to study, and they pretend to teach."

Lawrence Friedman of Stanford Law School compares the case method to an elementary school whose classes are labeled "English," "Arithmetic," and "Geography," but whose students are fingerpainting in all those classes because the teachers have decided that fingerpainting alone can teach creativity and self-expression.³²¹ Professor Friedman states that this is "a complete description of classical legal education."³²²

Numerous critics over recent decades have lamented that law school curricula neglect negotiation, transactions, alternative dispute mechanisms, drafting and other basic "lawyering" skills. There are also complaints about how little attention is paid to jurisprudence, legislation, comparative law, legal history, and economics or other social sciences -- despite their indisputable influence on our changing legal structure.³²³

The second major failing of law schools is that they do not teach students much of the important aspects of the profession

³²¹ Margolick, supra note __*, at 22.

³²² Id.

³²³ Law schools do prepare students to take the bar examination by offering the courses which are covered by the exam, but we should note that the subject matter of bar exams is the subject matter in first and second year courses. The third year curriculum is largely irrelevant to the exam in most states, so most students take bar review courses, offered commercially, to prepare themselves for the examination.

5370 of law -- about the culture of law practice or what Professor Paul
5371 Carrington has referred to as "republican virtue."

5372 Why don't law schools teach more courses which will
5373 prepare students to be lawyers? This question causes incredible
5374 rancor within legal education but it must be faced if we are to
5375 improve legal education.

5376

Chapter Ten

5377

WHY LAW SCHOOLS DON'T TEACH STUDENTS FOR CAREERS AS LAWYERS

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The title of this chapter -- "Why Law Schools Don't Teach

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Students for Careers as Lawyers," is certain to draw hostile

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reaction. In order to contain the hostility, let me concede at the

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start that today's law schools do teach many courses to prepare

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students for some aspects of lawyering. I will even concede that

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all law schools teach many courses which prepare students for law

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careers. Indeed, legal analysis which is taught and taught and

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taught does help prepare students for law careers. Yet the truth

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is that most students at most schools are treated to a rather

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steady diet of "Socratic lecture" or seminar courses which do not

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demand too much of the experienced law professor's time nor much of

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the law student after the first year when students learn that they

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can skip classes or just answer "not prepared" and get by quite

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nicely.

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Without a real reform effort, this is likely to continue,

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because law faculty culture generally accepts the rationale which

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is simply this: Legal education's role in society is to prepare

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the law student to think like a lawyer and to fit into the law firm

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which will then train and supervise the young lawyer. It is so

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neat that even Voltaire's Dr. Pangloss would approve: The law

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school program, after all, fits with the needs of the large law

5399 firm just as God has made the hand to fit so neatly into a glove.
5400 It is also convenient, because it creates an environment which
5401 provides the most comfortable working environment for law
5402 professors.

5403 This culture despises the thought of law schools becoming
5404 mere "trade schools" and the status-conscious law faculty are very
5405 quick to label those who teach skills courses, including legal
5406 writing, as of a lower caste. In a few law schools -- New Mexico
5407 and New York University come to mind -- there has been some
5408 breakthrough, but for the great number of law schools, the "trade
5409 school" phobia dominates any discussion of real curricular reform.
5410 This phobia is quite irrational, but it could be the most prevalent
5411 disease of tenured law professors. It is manifested by knee-jerk
5412 reaction to any proposal which might result in law students being
5413 trained for law practice. There are, of course, other arguments
5414 against such proposals, principally the costs. Skills training
5415 courses are extremely expensive when done properly, and require
5416 greater faculty resources than the typical "Paper Chase" classroom.
5417 But the articulation of the argument against skills courses is
5418 usually philosophic, and not economic.

5419 I do not argue that legal education is entirely static or
5420 even that law schools have refused to face up to the teacher
5421 resource problem. Donna Fossum conducted a study on law professors

published by the American Bar Foundation which showed that between 1947 and 1977 the number of ABA-accredited law schools rose from 111 to 163, while their total enrollments rose from 43,719 to 118,557.³²⁴ The number of full time law teachers grew even more rapidly. The number of law schools increased by 47 percent and total enrollments by 171 percent, whereas the number of full time law teachers increased by 291 percent, and (as a percentage of all law teachers) increased from 43 to 64 percent.³²⁵ This development can probably be attributed to the accrediting policies of the ABA during this period and the constant pressure on law schools to improve their disgraceful student faculty ratios.³²⁶ If the ABA can be proud of anything in its recent efforts to improve legal education, it is the consistent effort which the ABA Section of Legal Education and Admission to the Bar has made to improve the student faculty ratio.³²⁷

³²⁴ Donna Fossum, "Law Professors: A Profile of the Teaching Branch of the Legal Profession," 3 Am.B.Found. Res. J. 501, 505 (1980).

³²⁵ Id. 504-05.

³²⁶ See id. at 505-06 (tracing the development of ABA law school standards).

³²⁷ James P. White, ABA's consultant on legal education, is the person who deserves the most credit for this effort. His 1977 memorandum to law school deans, stating that the interpretation of the ABA standards of accreditation required more full time faculty than one for each 38 students, was but one formal step in a long and successful effort to deal with this problem. See id. at 506 n.20.

5450 Still, law schools do not compare favorably with other
5451 graduate education or even with community college terminal degree
5452 programs in such areas as medical technology or dental hygiene.
5453 There are simply not enough law professors to teach law students in
5454 the way that other professional schools and other graduate schools
5455 teach their students.

5456 Teaching a skills course requires a great deal of effort
5457 and takes a great deal of a faculty member's time. Working with
5458 students individually or in small groups can be very demanding and
5459 it leaves little time for publication. The ABA Standards for
5460 Accreditation do not help in this area, for they look to the total
5461 credit hours taught by faculty and do not recognize that certain
5462 types of courses are far more demanding than others.³²⁸

5463 Another factor which may influence law professors'
5464 decisions regarding which courses to teach is that law students are
5465 not as much fun to teach after their first year. Professors in
5466 other disciplines prefer to teach advanced students, but in legal
5467 education there is a marked preference for teaching first year
5468 students who are eager (or at least anxious) and who are much more

5469 ³²⁸ See ABA, Standards for Approval of Law Schools XS404
5470 (1987). I personally believe that the ABA standards should be
5471 reviewed and a revision adopted which allows tenured faculty
5472 members who are not regularly publishing to teach more than the
5473 standard two classes each semester.

5474 likely to prepare for class.

5475 Moreover, the professors themselves are not always
5476 trained in those skills and many are without substantial experience
5477 in lawyering. There are really two distinct points. First, since
5478 lawyers (and law professors) have not been trained in skills, they
5479 have not acquired the knowledge to pass on to law students. There
5480 are, of course, other disciplines which do train their students in
5481 skills which lawyers need. The skills of interviewing and
5482 counseling, for instance, are taught in the schools of social work,
5483 nursing, psychology and communications. The theater school teaches
5484 skills needed by most lawyers. Judge Richard Posner (a long-time
5485 law teacher) observes that, "Legal education involves imparting
5486 skills of analysis, but also skills of presentation, of advocacy
5487 broadly understood." He continues, "Rather little effort, however,
5488 is made at leading law schools (an important qualification) to
5489 impart the latter skills."³²⁹ Judge Posner observes that the main
5490 vehicle for training in advocacy is the moot court program which
5491 consists mostly of learning by doing and not instruction because,
5492 he says, "instruction in advocacy is thought to lack intellectual
5493 content and because such instruction is labor-intensive and

5494 ³²⁹ Richard A. Posner, Law and Literature (Harvard, 1988), p.
5495 359.

5496 therefore expensive."³³⁰

5497 Theater school professors do consider the teaching of
5498 presentation to have intellectual content (just as other academic
5499 disciplines believe that interviewing and counseling and
5500 negotiation have intellectual content) and I have witnessed the
5501 excitement which a drama teacher can bring to the teaching of the
5502 skills of presentation to law students. Judge Posner captures some
5503 of that excitement in his description of how advocacy can be taught
5504 "from the great literary examples of eloquence and persuasion,"
5505 such as the funeral orations in Julius Caesar . . . :

5506 Yet what better way to impart a feeling for
5507 the essentials of advocacy than by careful
5508 study and comparison of Brutus's and Antony's
5509 speeches? Among the weaknesses in Brutus's
5510 speech, which are equally weaknesses when
5511 found in an oral argument to an appellate
5512 court or a closing argument to a jury, are its
5513 overtly rhetorical character (which puts the
5514 audience -- equivalent to the tribunal in a
5515 law case -- on its guard), its failure to
5516 engage the audience in dialogue, its

5517 ³³⁰ Op. cit., p. 359.

5518 abstractness and lack of detail or anecdote,
5519 its failure to appeal to the concrete self-
5520 interest of the audience (equivalent to the
5521 concerns, which also are often quite
5522 parochial, of a legal tribunal), its failure
5523 to present evidence to support the crucial
5524 charge (Caesar's ambition), and the decision
5525 to waive rebuttal by departing before Antony
5526 begins to speak. Antony makes no such
5527 mistake. After neatly and "unrhetorically"
5528 (that is, with studied casualness)
5529 ingratiating himself with an audience
5530 predisposed to be hostile, he plunges directly
5531 into Brutus's only charge against Caesar
5532 (ambition) and offers three arguments against
5533 it. They are far from airtight, but since
5534 Antony has the last word he need not worry
5535 about rebuttal. He then displays emotion;
5536 brandishes Caesar's will (his first use of a
5537 prop); tells an anecdote about Caesar;
5538 displays Caesar's body (second use of a prop);
5539 shows the gashes and bloodstains in Caesar's
5540 toga, and then dramatically unveils the maimed
5541 body itself (the third prop, all of these
5542 props corresponding to physical evidence and

5543 visual aids in a trial or appeal); disclaims
5544 oratorical ability in a successful attempt to
5545 disarm the audience; uses the terms of the
5546 will to appeal to the audience's concrete
5547 interests and sense of gratitude; invites
5548 frequent interruption to create the impression
5549 of conversation rather than monologue; and
5550 moves about on the stage. He thus "proves"
5551 his points with a variety of demonstrative,
5552 kinetic, emotional devices (including meter,
5553 sarcasm, repetition, and suspense). It is a
5554 veritable catalogue of rhetorical tricks and
5555 turns. Concrete, vivid, personal,
5556 conversational, versatile, dramatic,
5557 empathetic with his audience, Antony is
5558 supremely effective at persuasion.

5559 The optimal tactics for persuading the Roman
5560 mob are not the same as those as those for
5561 persuading a panel of professional judges; but
5562 Antony's speech shows that the problem is
5563 indeed a tactical one or at least has an
5564 important tactical dimension. One must know
5565 one's audience, one's case, and one's
5566 opponent, and one must fashion a strategy and

tactics of persuasion from that knowledge,
drawing on a rich repertoire of rhetorical
devices vividly displayed in literature.³³¹

Most law professors have simply not been trained to teach
"advocacy broadly understood" nor to teach the presentation of a
case. Lawyers learn the skills of lawyering largely by experience,
yet law schools do not select faculty who have broad experience as
lawyers or judges, and, for economic reasons (and perhaps, other
reasons) favor those without such experience.³³² The typical law
professor is someone whose preparation for teaching following
graduation at the top of a law school class (preferably an "elite
school"), spends several years as an associate at a large corporate
firm, sometimes after first serving a year or two in a judicial
clerkship.

Law professors, at least the tenured faculty, control
legal education. Law school deans have very little power, and
increasingly serve short terms, an average of slightly more than

³³¹ Op. cit., p. 359.

³³² The design of Harvard's Dean Langdell did not favor
experienced lawyers as professors. See Stevens, supra note __*,
at 38 (quoting Langdell's assertion that law teachers needn't have
experience in using the law, but experience in learning the law).

5589 three years.³³³ The ABA accreditation standards insist that there
5590 be faculty governance,³³⁴ a standard which is clearly observed.
5591 In short, law schools are what law faculties say they should be and
5592 the character of law faculties is extremely relevant to legal
5593 education as a whole.

5594 Law School professors tend to be drawn from the so-called
5595 "elite" schools. A study by Frances Zemans and Victor Rosenbloom
5596 found that the place of law school education was the best predictor
5597 of the lawyer's legal career, and class standing the second best
5598 predictor.³³⁵ Donna Fossum's study of law professors teaching in
5599 1975-76 found that well over half of all full time law teachers
5600 came from twenty law schools and that a third of them came from
5601 only five schools.³³⁶ These twenty schools had all become members
5602 of the Association of American Law Schools by 1916 and thirteen
5603 were among the 27 law schools which founded AALS in 1900.³³⁷

5604 ³³³ In 1989, James White reported that the average tenure for
5605 deans of ABA accredited schools was 3.2 years. I was a law school
5606 dean for five years (1984-89), and when I left, I was a relatively
5607 senior dean. My successor stayed for two years.

5608 ³³⁴ ABA, Standards for Approval of Law Schools S403 (1987)
5609 (providing that "the governance of the law school rests upon the
5610 full-time faculty members).

5611 ³³⁵ Frances Kahn Zemans & Victor Rosenbloom, The Making of a
5612 Public Profession, _____ (1980).

5613 ³³⁶ Fossum, supra note __*, at 507.

5614 ³³⁷ Id. at 507-08.

5615 The Fossum study also shows that some law schools have
5616 very significant percentages of their graduates entering the
5617 teaching profession. While full time law teachers constitute less
5618 than 1% of the total profession, 4.7% of Yale Law School graduates
5619 in the period 1948-75 were teaching in 1976.³³⁸ Harvard, with a
5620 much larger student body, produced the largest number of teachers
5621 in this period -- 417 or 13.6% of the total number of teachers.³³⁹
5622 Yale produced 215 teachers, 7% of the total.³⁴⁰

5623 It is not surprising to learn that law teachers were also
5624 distinguished in their academic work. Donna Fossum found that 9.1
5625 percent (350) had been editors-in-chief of law reviews, 29.9
5626 percent (1,150) had held other positions on law reviews, and 8.6
5627 percent (333) had not participated on law reviews but had been
5628 elected to Coif.³⁴¹ "Thus," she concludes, "close to half had
5629 received academic honors during their own undergraduate legal
5630 education."³⁴² Further, she found that one-third of the teachers
5631 had earned advanced law degrees.³⁴³

5632 ³³⁸ Id. at 508.

5633 ³³⁹ Id. table 3.

5634 ³⁴⁰ Id.

5635 ³⁴¹ Id. at 509.

5636 ³⁴² Id.

5637 ³⁴³ Id.

5638 Only a small minority of teachers go directly to tenure
5639 track teaching. The Fossum study is interesting:

5640 Early Career Experiences of Law Teachers
5641 (Post-J.D. and Pre-Tenure-Track Teaching Experiences)

5642		N	%
5643	Direct to tenure track teaching	224	5.8
5644	Graduate-level law study only		
5645	(completed LL.M.)	182	4.7
5646	Clerked for judge only	175	4.5
5647	Taught in non-tenure-track position only	353	9.2
5648	Practiced law only	1,620	42.1
5649	Clerked and taught*	58	1.5
5650	Clerked and practiced	329	8.5
5651	Taught* and practiced	561	14.6
5652	Clerked, taught,* and practiced	76	2.0
5653	Other	<u>272</u>	<u>7.1</u>
5654	Total	3,850	100%

5655 *Refers to non-tenure-track positions on law school faculties.³⁴⁴

5656 This study shows that a large majority (67.2%) of
5657 teachers have some practice experience³⁴⁵ but the practice
5658 experience of law teachers is not extensive. As Donna Fossum
5659 observes,

5660 [o]f those teachers who had not entered tenure
5661 track teaching immediately upon earning the
5662 J.D. degree, 55.9 percent (2,028) had entered
5663 tenure track teaching within five years of

5664 ³⁴⁴ Id. at 510.

5665 ³⁴⁵ Id. at 511.

5666 receipt of the basic law degree and 80.1
5667 percent (2,907) had done so within ten years.
5668 Thus, to put it conversely, almost 20 percent
5669 of law teachers had ten or more years of other
5670 experience before beginning tenure track
5671 teaching.³⁴⁶

5672 The most startling finding in the Fossum study is the
5673 last sentence of the quotation above. It is likely that the
5674 percentage of faculty who have more than ten years of law
5675 experience before beginning their teaching careers has gone down
5676 drastically since this study was completed almost fifteen years
5677 ago. My intuition tells me that the practice experience of law
5678 professors is much less today than at the time of her study, but
5679 that a higher percentage have experience clerking for a judge. My
5680 guess is that law schools are moving more toward the model espoused
5681 by Dean Langdell, a model which seeks a teacher who does not have
5682 experience in practicing law, but only experience in studying the
5683 law.

5684 Donna Fossum's work does not provide any insights into
5685 the type of practice which law professors have experienced and
5686 whether they had significant client contact, authority over the

5687 ³⁴⁶ Id. at 512.

5688 handling of matters, contact with other opposing lawyers, etc., but
5689 I believe that the typical law professor has not argued many cases,
5690 dealt directly with many clients, negotiated many contracts, or
5691 practiced law in the "grand manner," although there are notable
5692 exceptions and even some law professors who have gone on to do
5693 great "real world" lawyering work from their academic base. Since
5694 most law professors practice with large law firms which are
5695 themselves becoming more and more specialized, the type of practice
5696 they experience is that of the large firm specialist, where client
5697 contact at the associate level is minimal, participation in bar
5698 activities and pro bono work is rare, and where the "big picture"
5699 is not in view.

5700 Law professors do not arrive at the academy with the
5701 experience to teach law students about law practice, nor do they
5702 fill this gap in experience during their years on the faculty. The
5703 accreditation standards for law schools properly contemplate that
5704 law teachers will not concurrently engage in too much law
5705 practice.³⁴⁷ The young law professor quickly learns that success

5706 ³⁴⁷ Standard 402(b) of the American Bar Association Standards
5707 for Approval of Law Schools states:

5708 A full-time faculty member is one who during the academic
5709 year devotes substantially all working time to teaching
5710 and legal scholarship, has no outside office or business
5711 activities, and whose outside professional activities, if
5712 any, are limited to those which relate to major academic
5713 interests or enrich the faculty member's capacity as
5714 scholar and teacher, or are of service to the public

5715 in legal education will be judged by scholarly works produced, that
5716 contact with the world of lawyering is not much credited, and that
5717 innovation in teaching is time-consuming and hardly ever rewarded.

5718 Judge Harry T. Edwards made another important observation
5719 about legal education in a speech to the Association of American
5720 Law Schools in 1988 when he commented on the distancing of law
5721 teachers from the profession.³⁴⁸

5722 Worse still is the attitude of active
5723 disdain for law practice that one continues to
5724 find too frequently among law faculties.
5725 Although there always has been some of this, I
5726 am now hearing from young friends in academe
5727 who are being positively steered away from any
5728 attention to the real world of the
5729 profession -- even to the extent that they
5730 feel their tenure may be on the line -- unless
5731 they take the path of a destructive critique,
5732 "trashing" the existing system without
5733 offering anything constructive. It seems the

5734 generally, and do not unduly interfere with one's
5735 responsibilities as a faculty member.

5736 ³⁴⁸ Harry T. Edwards, "The Role of Legal Education in Shaping
5737 the Profession," 38 Journal of Legal Education 285, 293 (1988).

5738 height of absurdity to do without the services
5739 of young scholars who are inclined to devote a
5740 meaningful portion of their careers to
5741 bridging the gap between these two worlds. In
5742 view of the mounting problems facing the
5743 profession, we cannot afford the luxury of
5744 allowing law teachers to adopt either the
5745 posture of pure reflection, which ignores the
5746 profession, or that of active disdain for it.

5747 There are, of course, valid historic reasons for asking
5748 that law schools be separated from teaching the bar examination and
5749 that law professors not practice law, but the whole package of
5750 standards and the culture of legal education today serves to
5751 perpetuate the separation between the academy and the bar and,
5752 indeed, to increase it.

5753 This excursion into the background and experience of law
5754 faculty is important to demonstrate that law faculty (which,
5755 remember, control the curriculum and, indeed, all the legal
5756 education program), are largely drawn from the "prestige" schools,
5757 have limited experience in law practice (largely with highly
5758 specialized large corporate law firms), and have entered a world
5759 where the incentives encourage in a very clear fashion, only
5760 individual publication. From this flows the sense that law

5761 professors are not suited for the teaching of practical skills or
5762 for the mission of inspiring students with the ideals of the
5763 profession. They have neither experience nor credibility. Nor is
5764 this problem of the profession drifting away from its traditions of
5765 public service of much concern to most professors. Law professors
5766 themselves have chosen to lead a somewhat cloistered life, and most
5767 had chosen the large corporate law firm on their way into teaching.
5768 It is the only experience they have to relate.

5769 Langdell built a great fortress³⁴⁹ and that fortress
5770 still guards most of legal education. Legal education is designed
5771 to be inexpensive to the universities, and comfortable to law
5772 professors. Law schools don't teach lawyering because the faculty
5773 is not interested or experienced and it is very expensive.

5774 ³⁴⁹ Professors J.R. Julin and Scott Van Alostyene originally
5775 coined the term, "Fortress Langdell." I like it.

Chapter Eleven

FREEING LAW SCHOOLS FROM THE ALLOCATION ROLE

Law schools are not wholly responsible for misallocation of lawyers in America. The schools exist alongside a labor market which has vastly increased the gap between corporate law and public interest law. The high starting salaries at top law firms can tempt even the most public-spirited graduates away from public service, particularly where those prospective new lawyers carry a heavy burden of debt.³⁵⁰

But law schools need not blindly push students toward corporate firms by emphasizing corporate law firm job placement, setting aside major portions of the school year for interviews, and failing to provide a competent job counseling service to law students. In most law schools, it takes little time for the beginning law student to get the message that specialties serving big business, such as corporate tax law, carry more "prestige" than criminal, poverty, divorce, or general practice. But "prestige" practice really means higher salaries, even if it is presented as

³⁵⁰ See Will Lingo, Debt Fret: Loans Worry Law Students, Winston-Salem Journal, March 2, 1992, at A1 (quoting Wake Forest law professor Charles P. Rose as saying that the cost of going to law school has changed the way students look for jobs: "A student would decide to be a prosecutor first, then he would look for the best job he could find . . . Now I think sometimes that money is the first thing [law students] consider when they're looking for a job."); Goodrich, supra note __*, at 146 (addressing the pressures on law students to work for large corporate law firms).

an opportunity to do "intellectually challenging" work. In fact, large corporate law firm work frequently is boring work, repetitious and narrow, and it offers relatively little client contact or opportunities to serve people who genuinely are in need of legal services and who appreciate those services. It is little wonder that students who enter law school with visions of serving society often decide to accept high-paying associate jobs serving America's biggest corporations. It is troubling, however, when we appreciate the efficiency of the mechanism developed to steer the law students to the law firms.

A great deal has been written about the development of modern law schools, and it is accepted that law schools as we know of them today were discovered by Christopher Columbus Langdell, who became dean of Harvard Law School in 1870.³⁵¹ We have already discussed Dean Langdell's theory of "scientific study" of law and the case method. He hired the original model of the modern law professor -- Ames -- who had no experience practicing law, beginning the model which we have seen fictionalized in Paper Chase. Many first year law students today believe that they have

³⁵¹ See, e.g., Fossum, supra note __*, at 501-02 (crediting Langdell with distinguishing the teaching of law from the practice of law). Insufficient credit has been given to the greater "republican virtue" vision of Thomas Jefferson, who put American legal education into the university environment. See Carrington, supra note __*, at 527-33 (discussing Jefferson's contributions to university legal education in America).

5829 known a law professor very much like Professor Kingsfield.
5830 Certainly the large class, Paper Chase model has been successful
5831 for our universities, which find that legal education produces
5832 graduates likely to achieve public prominence and financial success
5833 but who are comparatively inexpensive to educate.³⁵²

5834 Law schools as we know them today cannot be explained
5835 without returning to an earlier subject on another discovery -- the
5836 discovery of the modern law firm, referred to in Chapter Six. A
5837 major function of the law school, under the Walter Carter model law
5838 firm as it has evolved, is to sort out the students for the high
5839 paying corporate law jobs. It is easy to see that the only part of
5840 law schools which makes a real difference to the sorting process is
5841 the first year. This use of the law schools as a hiring hall for
5842 large law firms makes sense from the standpoint of lawyers intent
5843 on building Carter-style law firms. Does it make sense for law

5844 ³⁵² Arthur S. Hayes, "Law Schools Prove Milkable Cash Cows
5845 For Many Struggling Parent Universities," Wall Street Journal, June
5846 19, 1992, at B1. Mr. Hayes reports:

5847 In most universities, law schools are the rich
5848 cousins on campus. For one thing, costs are
5849 relatively low. The American Bar Association,
5850 which sets standards for accredited schools,
5851 permits a 30-1 student-faculty ratio and
5852 allows a law school to open its doors with
5853 only six full-time teachers. Couple the
5854 attractive economics of small faculties with a
5855 tradition of herding first-year law students
5856 into classes of 100 or more and you have a
5857 sure-fire way of filling seats on the cheap.

5858 students, law schools or society?

5859 If we attempt to answer this question by the conduct of
5860 the law schools, we must conclude that law schools seem to accept
5861 this relationship with only occasional grumbling and -- despite the
5862 peevish statements by professors that second and third year law
5863 students seem more interested in interviews than classes -- law
5864 schools generally are eager to serve the large law firms.

5865 This service to the firms is evident when the actual work
5866 of law school placement offices is examined, when we look at the
5867 ways law firms are accommodated, when we review the statements of
5868 deanly pride about law student placement, and when we see how
5869 incredibly efficient the system is.

5870 It is, after all, the role of most law school placement
5871 offices to arrange interviews for the large law firms. The
5872 organization of the National Association of Law Placement ("NALP")
5873 has probably increased this relationship between the potential
5874 employers and the law school facilitators. NALP features a mixture
5875 of law firm and law school membership and leadership, a mix which
5876 might be applauded in other contexts, but only the large law firms
5877 can afford to have their hiring partners and recruiting
5878 coordinators participate in such activities.

5879 The sincerity of deans and professors who frequently are
5880 heard to express dismay at the recruiting enterprise is put in
5881 question by the pride expressed on other occasions regarding the
5882 numbers of graduating students who have been hired and the
5883 particular pride about those who have gone on to the "great law
5884 firms." This system is, if anything, efficient. Given the
5885 enormous expenditures for recruiting made by the law firms, there
5886 remains little doubt that law schools have succeeded in serving the
5887 corporate law firm very well.

5888 We can gauge the sensitivity of the law schools'
5889 objections to law firm recruiting by asking whether there is any
5890 real effort to counter the large firm recruiting message. There
5891 are, of course, some efforts to promote public interest employment
5892 through loan forgiveness programs and some placement offices
5893 attempt to feature opportunities for public service, but the
5894 success of these efforts is very much in doubt.

5895 There is also a sentiment among thoughtful faculty which
5896 I first encountered when I was a member of an ABA accreditation
5897 site inspection team at Harvard Law School. There, I asked a
5898 faculty member responsible for oversight of the placement office
5899 for his thoughts about improvements in the placement efforts of the
5900 law school, and his answer was brief: "Abolish the placement
5901 office." He recognized that the placement office was too efficient

5927 of interest in public or community service. I recognize that
5928 applicants may not have always been sincere; I believe that most of
5929 them were. Even if some were not sincere, their expressions of
5930 such interest in public service at least indicates a belief that
5931 public service is the heart of law and at least of some interest to
5932 law schools. These students were being too generous. Do law
5933 schools ever really act on the students' offer of public service?
5934 When these students come to the law school, what do law schools do
5935 to nurture this sense of service?

5936 Others have analyzed the process of learning the law, and
5937 descriptions in fact and fiction explore the impact on values of a
5938 legal education. "Learning to think like a lawyer" has
5939 consequences for the profession where value neutral reasoning does
5940 not accept or accommodate any vision of public service. The books
5941 which have examined legal education both fact and fiction --Paper
5942 Chase, 1L, Anarchy and Elegance, Broken Contract -- develop these
5943 themes.

5944 Many law students are disoriented by legal education and
5945 look at law and legal careers without great self-confidence. To
5946 students, usually possessed of extremely talented minds and
5947 competitive personalities, law schools do send a message of values.
5948 That message is that the path to success -- the way to "win" -- is
5949 to get a job with a large law firm.

5950 In this process, success is defined by these firms, and
5951 law schools do very little to send any other message. Most law
5952 schools do not even counsel students or prepare them for what life
5953 will be in the large firm environment. Law schools don't tell law
5954 students about the economics of law practice in New York, don't
5955 talk much about quality of life, don't warn students about the
5956 conflicts they may face when they start a family.

5957 Law schools also don't talk to law students much about
5958 the things they thought about when they first wrote their admission
5959 essays. Professors don't talk about community, about public
5960 service or the meaning of the profession. Law students' admission
5961 essays usually talk of public service. When that talk is eloquent,
5962 (and the LSAT scores are high), we may admit the student. Sadly,
5963 we then cease the conversation.

5964 Legal education must free itself from its blind service
5965 of the corporate law firm, it must break out of its role as the
5966 allocator and facilitator for these firms and it must accept
5967 responsibility for training lawyers who have a sense of public
5968 service.

Chapter Twelve

PROPOSALS FOR REFORM OF LEGAL EDUCATION:
RECONNECTING LAW SCHOOLS WITH THE PROFESSION

Law Schools have in the last century followed the precepts of Professor Christopher Columbus Langdell, who sought to reduce law to a cold science, free of personal values and judgment. As Karl Llewellyn wrote in The Bramble Bush:³⁵⁵

The hardest job of the first year [of law school] is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice -- to knock these out of you . . . You are to acquire ability to think precisely, to analyze coldly, to see, and see only, and manipulate, the machinery of law.

The effectiveness of this approach shows up clearly in the changing attitudes of law students as they progress toward graduation. They enter with aspirations of public service and graduate with almost none of that early idealism.

At the end of his memoir of a year spent at Yale law

³⁵⁵ Karl Llewellyn, The Bramble Bush 101 (Dobbs-Ferry, New York: 1960).

5991 school, Anarchy and Elegance, Chris Goodrich wrote about listening
5992 to the commencement speaker urging the graduating class to serve
5993 society:

5994 [Supreme Court] Justice [William] Brennan
5995 was telling them to live up to the ideals of
5996 law, not its reality, but I wondered whether
5997 the message had gotten through. Most of these
5998 students would be corporate lawyers within a
5999 year or two; would they remember then what the
6000 ordinary American's dream was like, or had law
6001 school, and law practice, permanently
6002 distorted their understanding of such simple
6003 things?³⁵⁶

6004 Goodrich continued:

6005 Power, money, and prestige would be
6006 theirs for the next fifty years, but the price
6007 they paid might turn out to be a Faustian
6008 diminishment of the soul. The gowns worn by
6009 these new-made lawyers looked like regal
6010 judicial robes, but to me, at that time, in

6011 ³⁵⁶ Goodrich, supra, note __*, at 284.

6012 that place, they appeared [to be] an expensive
6013 kind of straitjacket.³⁵⁷

6014 This is a strange observation from a student at a school
6015 which has produced numerous graduates who play a large role as
6016 public officers. The three leading candidates for the 1992
6017 Democratic Presidential nomination were all graduates of Yale Law
6018 School.

6019 Goodrich's account is supported by Robert Stover's book,
6020 Making It and Breaking It,³⁵⁸ which reports on his study of public
6021 interest commitment during law school. The data he presents
6022 demonstrates that, during law school, students' interest in public
6023 service declines. Though the author and editor do not blame legal
6024 education entirely, they do observe that public service is not much
6025 discussed in law school, using an analogy of bookends without
6026 books: public service is discussed at orientation and graduation,
6027 but not, by and large, in law school.

6028 Instead of Thomas Jefferson's ideal of law schools for
6029 moral education and citizenship, our law schools have become
6030 training academies for large corporate law firms. With a few

6031 ³⁵⁷ Id.

6032 ³⁵⁸ Robert Stover, Making It and Breaking It (Urbana:
6033 University of Illinois Press, 1989).

6034 notable exceptions, we have today the spectacle of law schools
6035 whose mission is not serving justice -- but placement of students
6036 in corporate law firms. The bigger and more prosperous the firm,
6037 the better.

6038 Moreover, the law schools and the profession are not
6039 connected with one another in the way that most professions are
6040 connected to the schools which train members of that profession.

6041 To demonstrate this unique disconnection, ask a physician
6042 to name the five great members of her profession. Who will she
6043 name? When I have asked this question of physicians, the people
6044 named are always connected with academic medicine -- associated
6045 with a teaching hospital or a research facility. They will most
6046 likely be in the physician's own specialty but they are involved in
6047 teaching or research. It is not possible to be regarded as a great
6048 physician without some connection with academic medicine.

6049 Now, ask the practicing lawyer to name the five great
6050 living lawyers. I predict that, generally, you will get answers
6051 which will not list any academic lawyers. I have tried this
6052 exercise repeatedly and it is very unusual for the list to include

6053 anyone who has been a "pure" academic.³⁵⁹

6054 Why is this true?

6055 I believe that this exercise illustrates that there are
6056 larger perceived divisions between the practicing lawyer and the
6057 teacher of law than those between the medical practitioner and the
6058 medical school professor. Earlier, I argued that American law
6059 schools have drawn their strength from having a connection with the
6060 profession. But now that the profession has grown further and
6061 further away from the community, the law schools and the profession
6062 may also be separating from one another. Professor Paul Carrington
6063 reminds us that the originator of the American university-based
6064 legal education was Thomas Jefferson, then governor of
6065 Virginia.³⁶⁰ Jefferson was motivated by a desire to train the
6066 leaders of the country,³⁶¹ as was James Kent, the first law
6067 professor at Columbia, who said in his inaugural lecture:

6068 A lawyer in a free country . . . should be a
6069 person of irreproachable virtue and goodness.

6070 ³⁵⁹ I hasten to add that my list includes several such
6071 academics, Karl Llewellyn and Tony Amsterdam and that some lists
6072 include people like Archibold Cox who have done highly visible
6073 lawyering outside of the academy.

6074 ³⁶⁰ Carrington, supra note __*, at 527.

6075 ³⁶¹ Id.

6076

6077 [The design of this institution] is intended
6078 to explain the principles of our
6079 constitutions, the reason and history of our
6080 laws to illustrate them by comparison with
6081 those of other nations, and to point out the
6082 relation they bear to the spirit of
6083 representative republics.³⁶²

6084 Today, our law schools sometimes express the same
6085 motivation, but the dominant reality is that the vast efforts of
6086 legal education are going toward the provision of bright, young,
6087 carefully screened and socialized lawyers to serve the large law
6088 firms. Those law firms are increasingly remote from their
6089 communities, not so clearly identified with public service, and
6090 managed more and more with an eye to the "bottom line." If legal
6091 education is to go in any new direction, we ought to begin our
6092 thinking about how this direction can be pursued. Let us start
6093 with admissions.

6094 Admissions Policy Reshaped to Support a Culture of Public Service

6095 The law school admissions process is now a highly

6096 ³⁶² Carrington, supra note ____, at 341.

6097 organized and well financed operation led by the Law School
6098 Admission Council, an enterprise sponsored by the law schools which
6099 supervises the much-dreaded Law School Admission Test ("LSAT").
6100 The LSAT is the key element in the law school admissions process,
6101 since it is settled doctrine that the LSAT provides the only "level
6102 playing field" to judge candidates whose academic records are from
6103 such a diversity of disciplines and colleges.

6104 For my generation of law students, admissions standards
6105 were not a significant problem. Indeed, the admissions criteria at
6106 many law schools consisted of a single but uncannily accurate test.
6107 All of the characteristics of intelligence, integrity, commitment,
6108 literacy, honesty and extra-curricular involvement were measured by
6109 this single test, easily administered and rapidly analyzed. It
6110 consisted simply of taking an applicant's body temperature and, if
6111 it fell within several degrees of statistical reliability to 98.6
6112 degrees, the applicant was admitted. Since the law schools sought
6113 only warm bodies, the test served its purpose.³⁶³

6114 ³⁶³ It was during this era where the traditional greeting
6115 speech was given by an assistant dean, sometimes a retired military
6116 man with a General Patton complex: "Look to the left of you, look
6117 to the right of you -- in one year only one of you three will be
6118 with us." I remember thinking that it was the simple-minded
6119 assistant dean who should not be there.

6120 I have actually taken an LSAT and I believe it was
6121 administered properly and, though I was pressed for time and not
6122 quite accustomed to standardized machine-graded tests, I can report
6123 that my temperature was still reasonably close to 98.6.

6124 Today the admissions process operates almost entirely
6125 from different numbers -- the LSAT scores and undergraduate grades.
6126 There has been considerable discussion about this process and some
6127 proposals for reform.³⁶⁴ The Law School Admission Council,
6128 originally formed by a group of "elite" law schools to improve the
6129 admissions process, developed a strategy of a standard test for law
6130 school applicants. The Law School Admission Test ("LSAT") has
6131 become the standard test. The ABA's standards of accreditation
6132 inherently endorse the use of this test,³⁶⁵ even though those who
6133 have worked most closely with the process of constructing and

6134 True to the standards of our selection, my generation of
6135 lawyers has two complaints about law school admission policies:
6136 first, we have the feeling that many fine potential lawyers are
6137 being screened from the profession too early.

6138 The screening which prevents admission of a bright and
6139 honest young person, who, incidentally, is a nephew of a state
6140 senator, is unfair. Law schools should admit more good old boys
6141 and girls, not just "eggheads." Now, don't press lawyers to ask
6142 for only good old boys and girls when they recruit -- they want law
6143 review students.

6144 The second complaint is that there are too many people
6145 admitted to law schools. Yes, these are inconsistent.

6146 ³⁶⁴ In my native state, there has been a proposed resolution
6147 of the admissions problem which, though I do not commend it for
6148 adoption, I commend it for further reflection. Sen. Dempsey
6149 Barron, a very powerful state legislator, introduced legislation
6150 which would make a certain percentage of positions within all the
6151 professional schools available to applicants through a lottery
6152 system.

6153 ³⁶⁵ See ABA, Standards For Approval of Law Schools, S503
6154 91987) (standard 503 providing that "[a] law school that is not
6155 using the Law School Admission Test sponsored by Law School
6156 Admission Council should establish that it is using an acceptable
6157 test.").

6158 administering the test are quite skeptical about the way it is
6159 being used by the law schools.

6160 The Law School Admission Council which administers the
6161 LSAT enjoys a great deal of respect in the law school world.
6162 Indeed, the credibility of this group and its work product is so
6163 great that it remains in one sense its largest problem. The Law
6164 School Admission Council has itself undertaken to debunk the test.
6165 It has warned against the use of the small score differences for
6166 admissions purposes, it has restructured scoring of the test so
6167 that its accuracy would not be believed quite so literally by those
6168 who are called on to use it each day, and it has warned against too
6169 much reliance on the exam.³⁶⁶

6170 The Law School Admission Council has continued to search
6171 for better ways to handle law school admission. They have pursued
6172 the idea that some writing samples can be collected and made
6173 available for the law schools to consider.³⁶⁷ Today, the question
6174 of whether our admissions process serves society, the students, or
6175 the law schools should be put at issue.

6176 ³⁶⁶ See Law School Admission Council, supra note __*, at 125
6177 (discussing LSAT scores as predictors of law school performance).

6178 ³⁶⁷ Id. at 3 (stating that the Law School Data Assembly
6179 Service provides law schools with a report including writing
6180 samples).

6181 The law schools have largely mastered the process of
6182 screening applicants for ability to excel in first year courses.
6183 They now need help in developing ways to screen applicants for
6184 other attributes including the skills needed by lawyers and the
6185 applicants' concepts of public service. In suggesting this, I am
6186 not proposing another aptitude test, but rather a review of the
6187 processes of admission which, today, focuses almost entirely on
6188 intellectual skills.

6189 This focus will inevitably lead the law schools into
6190 trouble. The consideration of only intellectual skills as measured
6191 by the LSAT and grade point average has not served the majority of
6192 law schools that seek to have a racial and ethnic diversity.
6193 Moreover, attributes of leadership and character are not taken into
6194 account in the present admission process, particularly where the
6195 law school admissions committees refuse to interview applicants.

6196 The Law School Admission Council is the one organization
6197 closely associated with legal education which has the resources
6198 necessary to study and report on alternatives to the procedures now
6199 used and it should develop new approaches to the admission process.

6200 As I mentioned before, I read the personal statements of
6201 the students we accepted during my year as a dean. I was struck
6202 with the powerful commitment to public or community service

6203 contained in most of those statements. Virtually all these
6204 statements conveyed the desire of the applicants to contribute to
6205 their communities and to seek justice.

6206 I know that there is a reason for this. These applicants
6207 were all very smart and many wrote these things because they
6208 thought we wanted to hear them. But I'll even settle for that:
6209 they thought that we were about the business of public service,
6210 they thought we had a justice mission.

6211 After doing this for several years, I began to reflect on
6212 the one-sidedness of this conversation. They were writing their
6213 thoughts but the conversation ended there. We didn't respond with
6214 any conversation about justice and when we brought them into our
6215 classrooms, we immediately set out to "teach them to think like
6216 lawyers" -- to be detached and analytical.

6217 I never quite figured out what we ought to do to keep the
6218 conversation going. I did try something that I enjoyed, even if it
6219 did not have a great deal of impact -- I photocopied each third
6220 year student's personal statement a month or so before graduation
6221 and sent it back with a letter from me reminding them of their
6222 aspirations. This did bring some students to my door and led to
6223 some very satisfying discussions, but I realized that even this
6224 modest step was taken too late. Most students had already

6225 determined their job choices by that time.

6226 I still think that we could use the admissions process
6227 better to initiate a dialogue with our students. We might begin by
6228 developing some idea of what the justice mission of law school
6229 should be and putting that concept into our catalogs. We might
6230 even develop an admissions process which truly values public
6231 service.

6232 To accomplish this, we should develop admission processes
6233 which temper the law schools' reliance on grades and the LSAT
6234 examination. We know that the exam screens out too many men and
6235 women who could make substantial contributions to society as
6236 lawyers. Though this is undoubtedly true, I see no great argument
6237 for returning to the cruel days when law schools admitted vast
6238 numbers of students and then failed a high percentage.³⁶⁸

6239 At most schools, LSAT scores and undergraduate grades are
6240 virtually the only measures for admittance. How many law deans
6241 have not cited average LSAT scores of their students to boast of
6242 their school's improving reputation for excellence? I did when I
6243 was a dean.

6244 ³⁶⁸ Over one-half of my entering law school class did not
6245 complete law school.

6246 To break this reliance on numbers, law faculties should
6247 develop new admission processes, which take into account a
6248 prospective student's commitment and interest in serving the many
6249 legal needs of society.

6250 There are many possibilities, all of which can be
6251 accommodated within a law faculty decision to set a minimum
6252 standard for entrance, and all that I propose is a more intelligent
6253 way to exercise discretion. There are several ideas which come to
6254 mind.

6255 Interviewing Applicants

6256 Law schools should emulate the practice of some of the
6257 better universities and ask alumni to interview prospective
6258 students. The alumni will participate (no lawyer ever turns down
6259 a request from a law school) and the applicants will meet an actual
6260 human being. The lawyers conducting these interviews would be
6261 asked to first visit the school and participate in an orientation
6262 session which prepares them to understand the law school program,
6263 the goals of the admission process as set forth by the dean and
6264 faculty, and to understand that principles of conflict of interest
6265 apply where there is any personal, political or business
6266 relationship with the applicant.

6267 The results will not be any worse for the law schools in
6268 terms of paper record of students (in part because the faculty will
6269 set the parameters of the admissions process, and in part because
6270 lawyers do not see paper credentials any differently than faculty
6271 members³⁶⁹) and, with some dialogue between faculty and alumni,
6272 the process may actually be improved.

6273 The alumni interviewer should be able to help sort out
6274 the sincere from the insincere, and to probe behind the paper
6275 credentials which accompany most law school applications.

6276 If law schools aspire to promote public service, this
6277 aspiration can be advanced in this process. To begin with, the law
6278 school's objectives for its students can be communicated during the
6279 interview process. We could even ask the interviewers to give some
6280 preference to those applicants who have some demonstrated real
6281 commitment to public services. Better yet, we can recruit as our
6282 interviewers the alumni (and other lawyers) who have demonstrated
6283 a commitment to public service.

6284 ³⁶⁹ When J.R. "Dick" Julin was Dean of the College of Law at
6285 the University of Florida, he would place applicant documents
6286 before his faculty committee for evaluation, and then, with the
6287 names omitted before his alumni board. The results were virtually
6288 identical.

6289 Admissions Preference for Public Service

6290 The second proposal on admissions could be coupled with
6291 the first. William Buckley's recent book, Gratitude,³⁷⁰ suggested
6292 that a preference for college admission be given to those students
6293 who have demonstrated public service. This proposal should be
6294 appealing to law schools because it reinforces the good instincts,
6295 the sense of public service of law students from the very beginning
6296 of their contact with law schools. The law schools should find it
6297 pretty easy to adapt this idea, by adopting a schedule of credited
6298 public service (or, alternatively, commitment to public service
6299 after graduation) which could be weighed into all admission
6300 calculations, or at least used to tip the balance in selecting
6301 students who fall in the "gray area" between automatic admission
6302 and automatic rejection.

6303 Other Approaches to Admissions

6304 A full evaluation of applicants might also include an
6305 audition for verbal skills and ability to present a coherent
6306 message to an audience. This is, after all, one of the skills
6307 which is possessed by most great lawyers and since law schools do
6308 so little to teach skills, they might consider admission of people

6309 ³⁷⁰ William J. Buckley, Jr., Gratitude, (New York: Random
6310 House, 1990).

6311 who have already developed in these areas. It is probably heresy
6312 to suggest that lawyering skills share some aspects of the
6313 performing arts, but acknowledgement of that fact may help law
6314 schools rethink their admission processes. Drama and music schools
6315 retain their respect in the universities even though they audition
6316 their students. Perhaps law schools could give extra points to
6317 students who demonstrate exceptional talent in oral presentation.

6318 A final suggestion for law schools is wider
6319 experimentation with a summer program which allows applicants to
6320 demonstrate their willingness to work hard and "beat" their LSAT
6321 and grade point predictors. A relatively short summer session
6322 would allow students who demonstrate some level of competence to
6323 take law school courses and show that they were prepared to work
6324 hard enough to master the material. If they pass with sufficiently
6325 high scores they are allowed to continue on. In some respects,
6326 this is the model of the summer program for minority students which
6327 operates under the sponsorship of the federally funded Council on
6328 Legal Education Opportunity ("CLEO"). Such a program could be
6329 developed in cooperation with a graduate school which could offer
6330 credit. It could function merely as a "certificate" program which
6331 allows students who take the course to test legal education and
6332 those who are making admission decisions to screen the students.

6333 Faculty Recruitment

6334 After we admit the students, we must teach them and for
6335 that function we use law professors.

6336 We do not recruit faculty members today on the basis of
6337 their experience, much less their public service experience.
6338 Indeed, most of our emphasis is on past grades, class standing and
6339 scholarly potential. I spent five years as dean and seldom heard
6340 a faculty candidate asked about public service experience and never
6341 heard it as a leading argument for recruiting a faculty member.
6342 Faculty members who have known public service should greatly help
6343 law schools to teach about justice. Hiring faculty who have
6344 demonstrated such service is a pretty good indication of how we
6345 value that service.

6346 Clinics and Role Playing Courses

6347 Accreditation standards should require law schools to
6348 offer for all interested students at least one full semester of
6349 live client clinical or role-playing courses. Most law schools now
6350 offer these courses, but because these are much more expensive than
6351 the traditional Paper Chase style class, the number of students who
6352 can take the courses is limited. Law schools should not be
6353 permitted to neglect the education of students who seek at least

6354 some clinical experience.³⁷¹

6355 Clinical and role-playing programs can not only bring
6356 real-life problems for students to solve, but also bring students
6357 together collegially, rather than competitively. Law school moot
6358 court work is tremendously stimulating because the student group is
6359 small, brings students in close contact with professors and student
6360 team members, and exposes students to the sustained and
6361 constructive contact with working judges and lawyers. Moreover,
6362 this approach allows for some greater reflection on the role of
6363 lawyers. Moot court programs were a feature of the very early law
6364 schools in which the students were asked to moot not only court
6365 cases but debate legislative policy as well. Professor Carrington
6366 quotes Thomas Jefferson's 1780 letter to James Madison on the new
6367 law professorship.

6368 Wythe's school is numerous. [Carrington notes
6369 that he had 40 students.] They hold weekly
6370 courts and assemblies in the capitol. The
6371 professors join in it; and the young men

6372 ³⁷¹ This is an area where the Standards for Accreditation
6373 should be reviewed and a standard developed which requires law
6374 schools to offer some significant clinical experience to all
6375 students who seek that experience.

6376 dispute with elegance, method and
6377 learning.³⁷²³⁷³

6378 Professors Robert W. Gordon and William H. Simon argue
6379 that professional responsibility can be better taught with
6380 different approaches:

6381 . . . professional responsibility education
6382 should look to pedagogical approaches more
6383 conducive to the cultivation of reflective
6384 judgment than conventional law school
6385 teaching. This means attempting to overcome
6386 the regimented aspects of even the liberal
6387 post-Socratic classroom. Small classes and
6388 seminar formats would help. As many have
6389 argued, clinical courses in which students
6390 have responsibility for actual cases and
6391 clients are well suited for raising ethical
6392 issues, not only because they provide a rich
6393 practical context, but because they encourage

6394 ³⁷² See Carrington, supra note ____*, at 675 (discussing the
6395 existence of moot courts and moot legislatures under the teaching
6396 of George Wythe at the College of William and Mary during the
6397 1780s).

6398 ³⁷³ See Carrington, supra, note ____* at 340, footnote 11.

active student involvement.³⁷⁴

The value of role-playing courses has been proven by the success of the National Institute of Trial Advocacy ("NITA") techniques, which employ fictional case files, witness statements, pleadings, etc., to set up the context for students to play the roles of lawyers (and, at times, other roles as well). A well run NITA program employs demonstrations by experienced lawyers, opportunities for students to talk through their approach to a particular task, a chance to criticize and be criticized, and several sessions which are videotaped for review and criticism. The teaching in NITA is close in, personal, and very effective. Since students are actually asked to perform tasks for which they will be critiqued, they are usually very engaged.

NITA role-playing may not be as effective as live client clinics in some respects, but it does have some advantages in laying out a clear path of study and an assured experience (actual clients may settle the case). Role-playing courses are also less expensive and easier to schedule. The ideal is probably a role-playing course followed by a live client clinic.

Moot court, a "mock court" program which allows law

³⁷⁴ Robert W. Gordon and William H. Simon, The Redemption of Professionalism, _____ 16 (____).

6421 students to present arguments in hypothetical cases, is one of co-
6422 curricular features of most law schools. The moot court program is
6423 very special to me because of my own experience and my belief that
6424 the law students who have had moot court experience place a special
6425 value on it. Moot court provides a small group, cooperative
6426 experience in which law students work closely in a situation where
6427 there is a common objective. Typically, a moot court team of three
6428 or four students will work with a faculty advisor. In preparation
6429 for moot court arguments, the faculty advisor will often provide
6430 exercises in which the team argues before mock panels of other law
6431 professors, students, practicing lawyers or judges. The program
6432 offers opportunities for advocacy in a realistic setting and an
6433 unusually rich opportunity for critical review.

6434 This model for legal education which allows students to
6435 cooperate, allows faculty to work with small groups of students,
6436 and permits lawyers and judges to join the academic enterprise is,
6437 in my view, the model which should be utilized in legal education.

6438 The moot court program is such a rich experience that it
6439 is not surprising that it is valued by the law students who spend
6440 time with the program. When I was a law school dean, I was struck
6441 with the incredible loyalty to the law school of alumni who had
6442 been through the moot court program. A special relationship
6443 existed between the students themselves and between the students

6444 and their moot court coaches.³⁷⁵ Graduates with moot court
6445 experience seemed to most treasure their law school experience.

6446 The moot court programs have expanded in American law
6447 schools. Several decades ago, relatively few moot court
6448 competitions existed, and these were virtually all centered on
6449 appellate problems. Today, moot court programs exist as
6450 competitions between law schools for selected team members and as
6451 features of the law school curriculum for all students. The
6452 competitions have expanded to encompass a wide range of appellate
6453 moot court specialty subjects (labor, international law, securities
6454 law, etc.) allowing more students to participate in an increasingly
6455 diverse set of subjects and the competitions have gone beyond
6456 appellate practice and now include trial practice and even
6457 negotiation and counseling. Even with the expansion of the
6458 competitions into substantive law areas and into a variety of
6459 programs other than appeals, the competitive moot court programs
6460 reach only a minority of law students.

6461 The more important use of moot court is for the training
6462 of law students as part of the curriculum which trains all
6463 students. Here, the use of the appellate moot technique as a part
6464 of the first or second year program, often tied to the legal

6465 ³⁷⁵ My moot court coach was Professor Leonard Powers. I
6466 acknowledge my debt to him.

6467 research and writing program, is quite widely accepted. The other
6468 uses of the mooting technique have also had a large impact on legal
6469 education.

6470 The most important moot court development in recent years
6471 was the activity of the National Institute of Trial Advocacy
6472 ("NITA") which was formed by a group of law professors, lawyers and
6473 judges to further the techniques of teaching trial advocacy. The
6474 NITA developed techniques using role playing by students, and
6475 demonstrations by experienced advocates operating in a culture
6476 which encourages constructive criticism. The NITA style of
6477 training is expensive compared to the traditional lecture format
6478 and it requires considerable energy and organizational talent from
6479 the instructor.

6480 Although the extent of use of NITA techniques and
6481 materials by law schools and the reach of those courses to law
6482 students can not be fully gauged, my impression is that the NITA
6483 style courses exist at a great many law schools often taught by
6484 adjuncts -- practicing lawyers who have substantial trial
6485 experience.

6486 During my years as dean at Florida State University
6487 College of Law, I witnessed some very creative adaptations of the
6488 role-playing technique, several deserving comment. One course was

an appellate moot court program with a twist developed by Professor Pat Dore. The students selected for the course were given the problems actually before the United States Supreme Court and they were briefed and argued before a panel of students who were assigned the semester-long role of the individual justices. (When Justice John Paul Stevens visited the school, one student introduced herself by saying, "Justice Stevens, I am also Justice Stevens, but I have only had that honor for a semester.") In this course, the students who were assigned the lawyer roles played those roles and the justices played their roles, preparing for argument, conferencing, drafting and circulating opinions. The interest in the course was great and stimulation came from the opportunity for students to compare their work with the briefs and arguments actually made and their opinions with those of the court.³⁷⁶

Several other adaptations of moot court or role playing techniques existed at Florida State while I was dean, including an advanced property law course in which students prepared and defended documents filed before the actual condominium regulatory

³⁷⁶ I have used this technique to my great satisfaction and the apparent satisfaction of students. In 1992, I argued a case (Herrera v. Collins) before the United States Supreme Court and taught a role playing class built around that one case. The principal strategist and post-conviction counsel for Leonel Herrera was Mark Olive who taught the course with me. He was excellent and the students came away with some better sense of how lawyers and courts operate.

6516 authorities (Professor Jack Van Doren), a course where an
6517 administrative hearing officer heard a student presentation on a
6518 complex environmental matter with a variety of intervenors
6519 (Professor Donna Christie), and various other efforts within the
6520 class to make the material more real. For instance, a visiting
6521 professor, Kay Butler, used the technique of short hearings on
6522 draft pleadings and motions to help teach civil procedure.

6523 The most ambitious undertaking was to adapt the NITA idea
6524 to business subjects undertaken by Professor Joe Jacobs, who
6525 organized a course which was taught every day to students who took
6526 no other course. This was borrowed from the method used in the
6527 comprehensive trial skills course taught by Professor Steve
6528 Goldstein. Professor Goldstein taught client interviews,
6529 counselling, pleading, negotiation, discovery, pre-trial, trial,
6530 and appellate practice in a course which lasted through a whole
6531 semester with students getting their full academic load in this one
6532 course.

6533 Professor Jacobs designed a seven-week course built on
6534 the same basis -- that students would take only this one
6535 course.³⁷⁷ Students called the course "Deals" but was more

6536 ³⁷⁷ The academic mind immediately balks at a seven-week
6537 course. This is only one-half semester. We filled the other half
6538 with other half-semester courses, including courses taught by
6539 Oxford law dons in Jurisprudence, Comparative Law and the Law of

6540 formally known as "Advanced Business Skills." Having the students'
6541 full attention, Professor Jacobs was able to begin with a two-week
6542 intensive program that emphasized essential skills not otherwise
6543 available in other law school courses. The first week was spent in
6544 assuring that all students were able to read and analyze financial
6545 statements and was designed to allow students to evaluate
6546 corporations and proposed deals. The course required that students
6547 master the LOTUS 1-2-3 computer program and be able to value
6548 corporate worth. In the second week, the course focused on
6549 negotiations skills employing materials and techniques developed
6550 for this course by the Harvard Negotiation Project and taught
6551 originally by a team under the direction of Elizabeth Grey. This
6552 course, like the Advanced Litigation Skills course, made use of
6553 videotape and the critiques which are possible when that tool is
6554 available.

6555 The remaining five weeks were devoted to "deals" -- a new
6556 deal each week beginning with the simple business of organizing a
6557 small corporation, negotiating for its bank financing, working
6558 through relatively simple securities and tax problems. Each week
6559 the problems become increasingly complex and practical ethics
6560 problems were generously added to the facts.

6561 the European Community.

6562 The course was enhanced through lectures by law
6563 professors on special subjects and lawyer discussions regarding
6564 problems typically encountered in the business negotiations the
6565 students were facing that week. The lawyers remained in residence
6566 to act out roles as corporate counsel or as clients who constantly
6567 changed the problem (as clients frequently do in real life) and
6568 helped critique the negotiation exercises, the document drafting,
6569 and the students' approach to the problem.

6570 These intensive courses in skills training have many
6571 advantages, but they are expensive, serve only a few (only 12-20
6572 students), and require a great deal of effort from law professors.
6573 They offer a great opportunity for students by allowing them to get
6574 exposure to subjects which are difficult to reach in live client
6575 programs.

6576 To develop these ideas, I propose that a National
6577 Institute for Business Law Education³⁷⁸ perform in the role for
6578 business subjects that NITA performed for trial advocacy.³⁷⁹ A

6579 ³⁷⁸ This would be "NIBLA" so perhaps the name should be
6580 National Institute for Maximizing Business Law Education, or
6581 "NIMBLE." The ABA's Judicial Administration Division was largely
6582 responsible for creating the National Institute of Trial Advocacy
6583 and its leadership example might be picked up by the Business Law
6584 Section of the ABA which could sponsor the project.

6585 ³⁷⁹ The Task Force of the ABA Section of Legal Education and
6586 Admissions to the Bar (the "MacCrate" Task Force) suggests creation
6587 of an entity to look at innovations in legal education and in

6588 relatively small group of professors and lawyers could accomplish
6589 what the original NITA organizers did through developing materials,
6590 experimenting with teaching techniques and training teachers.

6591 Legal education can benefit from introducing a variety of
6592 other subjects for role playing. Thinking about this might lead us
6593 to other possibilities, perhaps even a return to a role-playing
6594 exercise which was featured in the very first university based law
6595 schools -- a moot legislature.³⁸⁰ If some group were to develop
6596 teaching models for city councils and state legislative committees
6597 featuring written as well as oral presentations and opportunities
6598 for demonstrations and critiques, then law schools might begin to
6599 use the materials just as law schools have used the National
6600 Institute of Trial Advocacy ("NITA") materials.

6601 The idea of NITA courses was originally developed by a
6602 group of lawyers, law professors, and judges who came together to
6603 help promote more effective teaching of trial advocacy. The
6604 materials and the techniques which came out of this process are
6605 used widely by programs in this country (and abroad), including
6606 programs for continuing education of lawyers and law schools that
6607 bring in practicing lawyers and judges.

6608 continuing legal education. If that can be done, the idea of a
6609 NITA-style program for other skills could be developed there.

6610 ³⁸⁰ Carrington, supra note __*, at 675.

The success of NITA has been great, yet it has not been imitated in other areas. There are, of course, programs which use role-playing to teach negotiation or client interviewing and counselling, and there are many individual professors who have used the role-playing technique in their classes. To date, however, there has been no attempt to bring together business lawyers and business law professors to develop high quality materials to teach business negotiation, drafting and advocacy. Given the movement of graduate business schools to the case method and problem method of teaching, this is all the more curious. Indeed, the prospect for cooperation between business professors, accounting professors, and law professors seems like such an obvious path to invigorating the education of students in these areas, it is hard to explain why something has not already been developed among academics with similar interests.³⁸¹ Perhaps the explanation lies with the old bromide which describes a university as a place of distinct and autonomous colleges joined only by a common parking problem.

Involving Other Disciplines in Legal Education

A special feature of American legal education has been the importation of ideas from important intellectual movements, and we should want to encourage law students to get exposure to

³⁸¹ There is at least one law school, Wake Forest, which is moving in that direction.

6634 economists, historians, psychologists and philosophers and many law
6635 schools have faculty who have advanced degrees in other subjects.
6636 Joint appointments which bring professors from other disciplines to
6637 the law schools are becoming more common. Efforts have been made
6638 to bring these other disciplines into legal education and important
6639 movements in legal education have been built around economics and
6640 social science. There have been very productive efforts to expand
6641 the horizons of law schools in the area of substantive law. Less
6642 has been done to improve the skills training of students by looking
6643 to the skills taught by other disciplines. Most law professors
6644 have not studied interviewing or counselling, yet the Colleges of
6645 Social Work have developed techniques for teaching these skills,
6646 and psychology professors can help as well. Many College of
6647 Communications faculties have people who have done important work
6648 in group dynamics and who have learned to teach skills such as
6649 negotiations. The theater school can teach about staging and
6650 performance, important subjects for law students who will be
6651 expected to speak to audiences. Nursing students and medical
6652 students are frequently taught how to deal with patients who are
6653 facing crisis, yet law students who will constantly deal with
6654 victims, survivors, broken families, never get this training.

6655 The truth is that law schools are far behind other
6656 disciplines in learning how to teach the skills lawyers need.

6657 Involving Practicing Lawyers in the Teaching Mission

6658 We ought to give more thought to ways law schools might
6659 use lawyers in the teaching mission. Of course, many lawyers are
6660 already involved in legal education. Most law schools I know
6661 routinely use lawyers and judges for moot court judges and special
6662 lectures. Harvard Law School has used practitioners to aid in
6663 teaching legal process and as short-term adjuncts to teach courses
6664 during the "January term." Lawyers are genuinely flattered to be
6665 invited to law schools. They give time freely and after giving
6666 time, are more likely to give money. Some schools, Georgetown
6667 comes to mind, use an extraordinary number of adjunct professors
6668 and most schools use some adjuncts, paying them a token stipend.
6669 Some law teachers are thinking of better ways to use adjuncts --
6670 team teaching is one of the techniques which holds great promise.

6671 This effort to connect law teachers and the practicing
6672 lawyer should be a two-way street. Lawyers have always sought law
6673 professors for important cases. When my opponents hired Professor
6674 Melville Nimmer in a copyright case, my client allowed us to hire
6675 Professor Vince Blasi, then of Michigan. Recent ideas for longer
6676 term arrangements are now taking hold. Dean Steve Frankino and the
6677 ubiquitous Bob Kutak (who developed a multi-state law firm from an
6678 Omaha, Nebraska base) set the model with a long-term, full-time
6679 professor in residence program. Others -- far from Omaha -- have

6680 attempted to keep pace, employing more modest professors in
6681 residence programs.³⁸² Some law firms have hired law professors
6682 to develop their in-house training and continuing legal education
6683 programs.

6684 These ideas should help improve legal education and help
6685 reconnect law schools with the practice of law.

6686 Exams

6687 Examination of law students is the next area which we
6688 should change. Let me introduce this subject with a personal
6689 experience. When I was a law school dean, I decided to undertake
6690 the long-time ambition of learning to fly. I took lessons through
6691 solo, obtained my license, and went on to get a single engine
6692 seaplane license and my instrument rating.

6693 The technique employed in pilot training was one of
6694 frequent examination to ensure that, at each stage, the students
6695 were mastering the material. I enjoyed that training, even though

6696 ³⁸² A few years ago, my law firm, Steel Hector & Davis in
6697 Miami, experimented with a short lectureship series. Professor
6698 Charles Ehrhardt of the Florida State College of Law, the drafter
6699 of the Florida Evidence Code, spent a week with us, and the next
6700 year Robert Clark, now dean at Harvard Law School, spent a week
6701 with firm members who specialize in banking and regulatory law. I
6702 hope that this program will be revived.

6703 I was in classes with people a fraction of my age, many of whom
6704 learned the material, particularly the technical material, much
6705 faster than I. One of the big differences between training a pilot
6706 and training a lawyer is that the student pilot is constantly
6707 tested and, if the student does not comprehend the material,
6708 opportunities for retests are given after review, and if necessary,
6709 individual instruction is given. The mission of the instructor is
6710 to be certain that each student is a competent pilot, familiar with
6711 the theory and the practice of flight.

6712 I began to contrast the process of training pilots and
6713 that of training lawyers. Both of these are in some sense high
6714 risk endeavors, and a lot is at stake, but the way these subjects
6715 are taught is so radically different.

6716 Perhaps being a pilot is not as important or as
6717 intellectually challenging or as academic a pursuit as being a
6718 lawyer (although this proposition is easier to maintain on the
6719 ground than it is at 40,000 feet facing an instrument landing in
6720 bad weather). Both piloting an airplane and the practice of law
6721 require a person who can master complicated material, analyze a
6722 problem, and apply that analysis, sometimes under rather intense
6723 pressure. The process for law school examinations focuses on the
6724 ability to analyze problems and to write essays or answer objective
6725 questions about that analysis under conditions where time is

6726 strictly limited.

6727 In law schools, we generally test once a semester and,
6728 except for legal research and writing courses (and live client
6729 clinic, moot court, trial practice or other role-playing courses),
6730 there is almost no feedback from the professors. Even after an
6731 exam is administered and graded, it is seldom used to critique or
6732 supply feedback. The exam is used almost solely for the sorting
6733 function. Law school testing practices can be defended for only
6734 one reason -- it is supported because it is the system which is
6735 least taxing on the energies of law professors.

6736 Law schools should change the overemphasis on the grade
6737 scored on a single examination for each course and require that
6738 students prepare frequent written assignments. It is not enough
6739 that we provide a separate legal writing course in the first year,
6740 or even follow up with a "senior writing requirement." By
6741 requiring frequent writing projects, including exams, throughout
6742 the curriculum, we would teach a skill which is critical both as a
6743 way to communicate legal arguments and as a way to instill a
6744 problem-solving discipline which comes only from writing about that
6745 problem.

6746 This curriculum overhaul would involve a much higher
6747 ratio of teachers to students, so that law students could have many

6748 more opportunities for teacher contact, criticism, and
6749 collegiality.

6750 Reform of Third Year Program

6751 The most important step which can be taken in law school
6752 reform is to restructure law schools so that the third year offers
6753 courses which more accurately meet the needs of future lawyers.³⁸³
6754 The third year does not benefit most students, who are typically
6755 involved in more practical pursuits outside of law school. Some of
6756 these are useful to the law student's education, many are not.
6757 Some outside employment actually teaches law students how to
6758 practice law the wrong way because students learn sloppy or even
6759 marginal practices when they work for the wrong law firms.

6760 The only real beneficiaries of our neglect of a true
6761 lawyering component to legal education seem to be the faculty,
6762 university administrations (for whom law schools can be profit and
6763 prestige centers), and, of course, proprietors of bar review
6764 courses.

6765 In the next chapter, I propose that the bar exam should

6766 ³⁸³ I am not arguing that all law schools should have the
6767 same curricula nor that all students ought to take the same
6768 courses. I argue only that law schools should at least offer such
6769 courses to third year students.

6770 be given as soon as students have studied doctrine necessary for
6771 that exam, that is, usually after one or two years of law
6772 school.³⁸⁴ For students who pass the bar exam by the end of their
6773 second year, the third year could give them the opportunity to look
6774 more seriously at other subjects, to pursue scholarly subjects for
6775 publication, to take courses in other disciplines and, for most, to
6776 follow a course of study in the skills necessary for law practice.

6777 Under this model, third year students would continue in
6778 law school full time for the third year, taking specialized
6779 courses. These courses could be structured so that practicing
6780 attorneys, judges, foreign academics and professors from other
6781 disciplines could come to the law school. The law schools could
6782 also expand clinical programs, particularly those which place
6783 students with public interest offices and expose them to legal
6784 services for the poor.

6785 Perhaps law schools could even cooperate in developing
6786 specialty programs and sharing students. Georgetown has an array
6787 of international programs, NYU and the University of Florida have
6788 distinguished programs in taxation. Students could go to other
6789 schools in the third year, perhaps even studying abroad, learning

6790 ³⁸⁴ I also argue that the bar exam should be waived for those
6791 students who have taken an enriched course of study.

6792 a foreign language and foreign legal systems.³⁸⁵

6793 Reduction in Student Faculty Ratio

6794 The fundamental structural change which must take place
6795 if any real reform of legal education is to be achieved is that the
6796 teaching resources of law schools must be greatly expanded.

6797 The reform which is essential if other reforms are to
6798 take place is the expansion of faculties and the reduction of the
6799 horrendous size of law school classes. Dean James White, the ABA
6800 Consultant on Legal Education and the person who has been most
6801 diligent in pursuing this issue, has said that the student faculty
6802 ratio in law schools today is around 25-to-one -- a ratio which is
6803 unacceptable for a graduate program in any other field. In medical
6804 schools, faculty often outnumber the student two or three to one.
6805 Johns Hopkins Medical School, for example, has some 1,400 full-time
6806 and nearly as many part-time faculty, to teach fewer than 500
6807 students. In schools of dentistry, there are one or two students
6808 for every faculty member. In graduate schools of engineering,
6809 there are three or four students for every faculty member. The
6810 richness of the learning experience in these other fields is
6811 immediately apparent.

6812 ³⁸⁵ It may be necessary to change the accreditation standards
6813 to permit this flexibility.

6814 For example, consider this description of medical school
6815 studies from Peterson's Guide to Graduate Programs:

6816 [Besides basic science courses] [d]uring
6817 the first two years, many medical schools also
6818 teach students how to perform a physical
6819 examination and diagnose illness ... through
6820 lectures, self-paced learning programs ...,
6821 laboratory experience ... evaluations of
6822 specimens from sick patients, and actual
6823 encounters with real and simulated
6824 patients.³⁸⁶

6825 The description continues:

6826 The second half of medical education
6827 consists of instruction in the clinical
6828 sciences, such as pediatrics, surgery,
6829 psychiatry, internal medicine, radiology,
6830 neurology, anesthesiology, obstetrics,
6831 gynecology, emergency medicine, and family
6832 practice. During the clinical years students
6833 spend one- to four-month blocks of time

6834 ³⁸⁶ Peterson's Guide to Graduate Programs in Business,
6835 Education, Health & Law, 1231 (Princeton: New Jersey, 1992).

6836 (clerkships) learning about most of the major
6837 specialties. The student works in teams with
6838 faculty mentors, residents in each discipline,
6839 nurses, and other health-care personnel.

6840 I present this description because it contrasts so
6841 sharply with the impersonal, boot-camp style learning environment
6842 of a typical law school. And it should bring us to question how
6843 serious we are about educating lawyers in such an environment and
6844 why we do not do more for our students.

6845 Mandatory Pro Bono for Law Students

6846 Mandatory pro bono requirements have been established at
6847 a number of law schools. No better method exists to introduce the
6848 law student to the profession's commitment to public service work.

6849 This law school pro bono movement has been supported by
6850 the organization of Law Students for Pro Bono and it has made
6851 progress in enlisting students at most law schools. Six law
6852 schools now have mandatory pro bono requirements, and a growing
6853 number of others are actively considering it.

6854 Derek Bok, in his book, Higher Learning,³⁸⁷ noted that
6855 sending students into the community had the desired effect of
6856 exposing law students to the real issues of law:

6857 The act of representing real clients from poor
6858 neighborhoods probably did more to raise
6859 student consciousness about the adequacy of
6860 legal services and the moral dilemmas of
6861 practice than did most of the existing courses
6862 on the subject.

6863 The Pro Bono Coordinator for the University of
6864 Pennsylvania said something very similar at a meeting of the
6865 Society of American Law Teachers: "It's a course in Urban Life
6866 101, teaching students about their community." No good reason
6867 exists as to why pro bono service cannot become a commitment which
6868 law professors take on, as well. Outstanding pro bono service by
6869 a faculty member should become just as important for promotion and
6870 tenure as other factors.

6871 ³⁸⁷ Derek Bok, Higher Learning (Cambridge, Mass: Harvard
6872 University Press, 1986).

6873 Placement

6874 Any proposed program of reform must look at law school
6875 placement programs, which funnel the "best" students to the largest
6876 firms and the largest salaries. Law schools do not prepare their
6877 students for interviews with law firms, we do not prepare them to
6878 learn from their clerkships, and we do not tell them what we know
6879 about the growing dissatisfaction among practicing lawyers. We can
6880 at least help guide students to look at careers beyond the large
6881 corporate law firms. Our placement officers can help teach
6882 students to ask the large law firms hard questions about the
6883 quality of life for associates, maternity leave and the firms' real
6884 commitment to pro bono work.

6885 The placement process should help prepare students for
6886 summer clerkships and use this experience as something the law
6887 schools can use in furthering the student's education (and critical
6888 powers). There is a story about the young lawyer who dies and
6889 appears before St. Peter, who asks the recently departed to elect
6890 heaven or hell. She elects hell and when she arrives, she finds
6891 herself in an extremely disagreeable place -- oppressive heat and
6892 humidity, noxious fumes, poor food, backbreaking work for long
6893 hours, disagreeable and tyrannical overseers.

6894 But even hell has due process and she took her complaint

6895 to the devil. "Last year," she protested, "I visited here and it
6896 was a lovely place -- congenial colleagues, interesting work, long
6897 lunch hours, frequent social functions. That is how I pictured
6898 this place when I was asked to make an election." "Ah," said the
6899 Devil, "you visited here on our program for summer associates."

6900 We know why that story is so popular among law students.
6901 One Virginia lawyer who practices with a large firm observed that
6902 the principle lesson law students should carry away from large firm
6903 summer associate programs is "a practical lesson in fraud in the
6904 inducement."³⁸⁸

6905 I agree with the goal of getting placement offices to
6906 help guide students at careers beyond large law firms. However, we
6907 must live with the fact that the large law firm is here to stay and
6908 we must accommodate it. The justice mission of legal education can
6909 be furthered by engaging our placement offices as something more
6910 than fawning servants of the large firm interests. Law firms
6911 should be asked hard questions about the quality of life and the
6912 nature of their commitment to pro bono. We can teach our students
6913 to ask these questions, to evaluate job offers on their true
6914 economic terms, and to think about the role they will serve in
6915 society.

6916 ³⁸⁸ Remarks at the 1991 Virginia Bar Conclave on Legal
6917 Education.

6918 Public Interest Lectures

6919 In addition to the curriculum ideas which others have
6920 advanced, law schools can consider a special course on public
6921 interest or civil rights law. At the Florida State University
6922 College of Law, we established a chair which was funded for that
6923 purpose. That chair has attracted some very distinguished lawyers
6924 and law professors to spend several weeks teaching a class,
6925 lecturing on special subjects, and counselling students through
6926 presentations about public service and civil rights. A list of
6927 those who have been at the school includes Deborah Rhode of
6928 Stanford University Law School, Ken Greenawalt of Columbia, Mike
6929 Tigar of the University of Texas Law School, Jack Greenberg, also
6930 from Columbia, Elizabeth Schneider of the Brooklyn College Law
6931 School, Jack Boger, who was with the NAACP Legal Defense Fund and
6932 is now at the University of North Carolina Law School, Derek Bell
6933 of Harvard, Randy Kennedy, also at Harvard Law School, Sylvia Law,
6934 of New York University, and Steve Bright, the director of the
6935 Southern Center for Human Rights.

6936 Additionally, we made a practice of inviting Florida
6937 lawyers who were recognized by the Florida Supreme Court for their
6938 pro bono efforts to spend time with students and share their
6939 experiences.

6940 Summary

6941 Some legal educators may feel this has been an assault on
6942 their accomplishments. It is not. It is simply a call to face a
6943 reality that we have all been ignoring. It is a call to practicing
6944 attorneys that we must rejoin the profession with the law schools.
6945 An important date in the separation of the academic and the
6946 professional was 1914, the last year in which the ABA and AALS held
6947 annual meetings together. Recently, efforts have been made to
6948 reconnect the practicing lawyer and the academic lawyer. The ABA
6949 modified its membership policies and allowed inexpensive faculty
6950 group memberships, a move which brought about a substantial
6951 increase in faculty members in the American Bar Association. Many
6952 sections and committees of the ABA and state and local bar
6953 associations have recruited law faculty members in active
6954 leadership roles. There are many other important steps being
6955 taken.

6956 Beginning now, we should seek to reconnect the
6957 relationship between academy and profession, a move which must
6958 begin with lawyers. Lawyers do not help legal education by mere
6959 criticism, but they can help obtain the needed resources for legal
6960 education. I see this as a case in which the law schools have not
6961 failed the profession, but that the profession has failed the law
6962 schools.

6963 How can legal education change? This question can be
6964 answered better if we examine the changes which have already taken
6965 place.

6966 "Do you believe that legal education can ever change?"
6967 If I am asked this question, I respond in much the same way as the
6968 Alabama farmer did when he was asked if he believed in baptism by
6969 total immersion. "Believe in it," he replied, "certainly I believe
6970 in it. I've seen it with my own eyes." In our lifetime, what have
6971 we seen to make us believe in improvements in legal education?
6972 And, while we are on this catalog, what forces brought about those
6973 changes?

6974 As I look over legal education in my lifetime, there have
6975 been many significant and constructive changes. I want to catalog
6976 some of those and assess the "agent of change" for each.³⁸⁹

6977 • Clinical education became much more common in American
6978 legal education after the Ford Foundation provided an enticement
6979 through grants awarded through the Council for Legal Education and
6980 Public Responsibility ("CLPR") and, recently, encouraged in several
6981 states (California, Colorado and Alaska) by the bar examination.

6982 ³⁸⁹ I recognize that for many of these, the origin was
6983 academic -- a scholar began to think of ways to improve legal
6984 education, wrote and lectured about those ideas.

6985 In recent years, the ABA's standards for law school accreditation
6986 have also been helpful in encouraging clinical programs and better
6987 treatment of skills teachers.

6988 • Role playing courses: The National Institute of Trial
6989 Advocacy ("NITA") developed role playing courses for training of
6990 trial lawyers, initiated by the ABA's Judicial Administration
6991 Division, accomplished through a cooperative process which involved
6992 law professors, lawyers and judges, and sustained by a self-
6993 supporting, independent organization, the National Institute for
6994 Trial Advocacy ("NITA").

6995 • Diversity in student body and most faculties was
6996 accomplished by individual law schools after prodding by the ABA
6997 and Association of American Law Schools accreditation
6998 processes.³⁹⁰

6999 • Improvements in admission process (principally, the Law
7000 School Admission Test) originated in a cooperative effort by a
7001 group of elite law schools and sustained by an organization (the

7002 ³⁹⁰ See, ABA, Standards for Approval of Law Schools S212
7003 (1987) (providing that law schools "shall demonstrate, or have
7004 carried out and maintained, by concrete action, a commitment to
7005 providing full opportunities for the study of law and entry into
7006 the profession by qualified members of groups (notably racial and
7007 ethnic minorities) which have been victims of discrimination in
7008 various forms).

7009 Law School Admission Council), whose members are now the ABA
7010 accredited law schools. Funding comes from the LSAT fees.³⁹¹

7011 • Improvements in placement services and the collection
7012 of data have been supported by the organization of the National
7013 Association of Law Placement and through the accreditation
7014 process.³⁹²

7015 • Improvements in student faculty ratios have been
7016 accomplished at most schools through pressure brought by the ABA
7017 Section on Legal Education and Admission to the Bar in its
7018 accreditation process.

7019 • Increase in legal research and writing courses has been
7020 encouraged through the ABA and AALS accreditation process³⁹³

7021 • Development of legal ethics courses was required by ABA

7022 ³⁹¹ See Law School Admission Council, supra note __*, at 1
7023 (describing the LSAC).

7024 ³⁹² See ABA, supra note __* at S214 (providing that law
7025 schools "should provide adequate staff, space and resources, in
7026 view of the size and program of the school, to maintain an active
7027 placement service to assist its graduates to make sound career
7028 choices.").

7029 ³⁹³ See id. at S303 (providing that "[t]he education program
7030 of the law school shall provide adequate opportunity for ...
7031 studies in seminars or directed research."); see also id. at S302
7032 (providing that "[t]he law school shall ... offer to all its
7033 students at least one rigorous writing experience.").

7034 accreditation standards³⁹⁴ and was encouraged through pressure
7035 from the judiciary and the profession, including bar examiners.³⁹⁵

7036 • Development of alternative dispute resolution courses
7037 has been encouraged through the ABA and promoted by several
7038 conferences and the development of teaching materials.

7039 • Expansion of law journal programs, largely accomplished
7040 by law students and faculty members who have sought to expand the
7041 opportunities for students to gain writing experience and to
7042 support special programs favored by law professors.

7043 • Expansion of moot court programs reflecting the
7044 increasing specialization of the bar with new programs focusing on
7045 specialties -- labor, securities, international law, etc. -- has
7046 been encouraged by specialty bars and law schools with specialist
7047 programs.

7048 As we search for ways to implement any agenda for reform

7049 ³⁹⁴ See id. at S302 (providing that "[t]he law school shall
7050 ... require of all candidates for the first professional degree,
7051 instruction in the duties and responsibilities of the legal
7052 profession.").

7053 ³⁹⁵ See e.g., Florida Board of Bar Examiners, supra note
7054 ____, art. VI, X1 (providing that [t]he Florida Bar Examination
7055 shall consist of a General Bar Examination and the Multi-state
7056 Professional Responsibility Examination (MPRE)).

7057 of legal education, we must keep in mind the forces which have been
7058 brought about these changes. They are identified above, but a
7059 relisting will give us a menu of change mechanisms:³⁹⁶

7060 1) Grants: new resources tied to new programs (the
7061 Ford Foundation funding led to many clinical programs);

7062 2) Innovation by Bar or Academic Committees and
7063 Conferences: (NITA came from initiatives of the ABA's Judicial
7064 Administration Division and the ABA's 1976 "Pound Conference
7065 Revisited" led to the formation of the ABA Dispute Resolution
7066 Committee and ultimately to law school curriculum innovations to
7067 teach dispute resolution);

7068 3) Cooperation among law schools (the law school
7069 admissions test).

7070 4) Accreditation process (student faculty ratios have
7071 been reduced drastically over a period of years through this
7072 method) even without a new accreditation process;

7073 5) ABA accreditation standards for law schools brought

7074 ³⁹⁶ I exclude from the list social, economic and
7075 technological forces which will have a play of their own in
7076 changing legal education.

7077 about changes in law school student recruitment (affirmative
7078 action) and even in curriculum (legal ethics);

7079 6) Pressure from the bar exam -- placing subjects on
7080 the bar exam leads to law school curricular reform because students
7081 will demand the courses;

7082 I have ranked these techniques of change by my personal
7083 preference. I most prefer the model of grants, but I do not know
7084 of anyone who proposes to give significant resources for innovation
7085 at law schools. It is not practical to take on vast curricular
7086 changes through the accreditation standards; even where the
7087 accreditation process is the appropriate instrument to be used, it
7088 takes a very long time. There does not seem to be a large
7089 consensus developing that will make much difference through
7090 committees, conferences or cooperation between law schools,
7091 although the 1992 report of the MacCrate Task Force may yet
7092 generate that energy. I turn, then, with trepidation, to the bar
7093 exam.

Chapter Thirteen

BEGINNING WITH THE END:
REFORMING LAW SCHOOLS THROUGH THE BAR EXAM

No lawyers anywhere in the world have been as successful as American lawyers have been in raising the standards of the profession. The two main tools in the professional movement have been the law school and the bar exam. The control of these two institutions seems, on the surface at least, to be in the hands of two quite distinct groups. The law schools operate under the control of the law faculties (subject, of course, to the accreditation process) and the boards of bar examiners are dominated by practicing lawyers.³⁹⁷

This divergence in control seems to be supported by practical factors which separate formal legal education from the bar exam. Indeed, the accreditation standards of the ABA prohibit law schools from giving credit to students for the bar exam preparation courses.³⁹⁸

³⁹⁷ The Florida Supreme Court has adopted rules which prohibit law professors from serving on the Board of Bar Examiners. See Florida Board of Bar Examiners, supra note __*, art. I, §3(e) (providing that "[b]ar examiners should not participate directly or indirectly in courses for the preparation of applicants for bar admission.").

³⁹⁸ See ABA, supra note __*, at S302 (providing that a law school "may not offer to its students, for academic credit or as a condition to graduation, instruction that is designed as a bar examination review course."). Thirty years ago, law school

7121 While this separation of function and control might be
7122 thought to be a wholesome aspect of the arrangements through which
7123 we prepare law students for the practice of law, I do not believe
7124 it is wholesome, nor do I believe it has worked. If we were to
7125 describe this division of function and authority to someone
7126 unfamiliar with the reality, they would probably respond with a nod
7127 of understanding. Logically, it would seem that such an
7128 arrangement would allow the accreditation by the academy to
7129 concentrate on academic matters while allowing bar examiners to
7130 assure that applicants are competent to actually serve clients.
7131 But that is not the way our system works. The bar exam merely
7132 tests on very basic common law and state law subjects, and is at
7133 once the most traditional and the most redundant element in the
7134 process through which students become lawyers.

7135 The legal profession has worried about the problem of law
7136 students' preparation for the bar exam and the development of the
7137 "bridge-the-gap" programs have been a response to this concern.
7138 These programs, typically offered around the time that a lawyer is
7139 to be sworn into the bar, are attempts by the bar to offer
7140 orientation to the profession and to fill in the voids in legal
7141 education that law schools have failed to fill. The very

7142 faculties gave at little or no cost a one to two-week bar review
7143 course for graduates. Subsequently, commercialization took hold
7144 and bar review courses have become a major commercial enterprise.

terminology -- "bridge-the-gap" -- suggests that there is a gap between legal education and the information and skills needed to practice law.³⁹⁹

The American Bar Foundation recently released a valuable research document which updates an important study of the legal profession, published over a decade ago,⁴⁰⁰ identifying notable gaps between education and practice as seen by the practicing lawyer. The new study, by B. G. Garth and Joanne Martin of the American Bar Foundation⁴⁰¹ identified the skills of particular importance to lawyers (in context of large firm/small firm and urban/rural practice environments) and sought to gather information about the law schools' "attention to and capacity for teaching skills and areas of knowledge." The study found that the "clear winners on the hierarchy ... are communication skills -- written

³⁹⁹ "Legal educators and practicing lawyers should stop viewing themselves as separated by a 'gap' and recognize that they are engaged in a common enterprise - the education and professional development of the members of a great profession." American Bar Association, Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development - An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, at p. 3.

⁴⁰⁰ Frances Kahn Zemans and Victor Rosenblum, The Making of a Public Profession (American Bar Foundation, 1981).

⁴⁰¹ Bryant G. Garth and Joanne Martin, "Law Schools and the Construction of Competence," American Bar Foundation Working Paper #9212 (1992).

7172 and oral."⁴⁰² When the study looked at the law schools, it found
7173 them lacking (in the opinions of those surveyed):⁴⁰³

7174 There are notable gaps in the two skills
7175 deemed most important -- oral and written
7176 communication -- and in all the "practical"
7177 areas, including solving legal problems,
7178 negotiation, counseling, fact-gathering, and
7179 conducting litigation. For oral
7180 communication, 77 percent thought that the
7181 skill could be taught, and only 39 percent
7182 thought that sufficient attention was given to
7183 the skill in law school. In the case of
7184 written communication, 91 percent thought it
7185 could be taught effectively in law school, a
7186 figure higher than for any other skill except

7187 ⁴⁰² Op. cit., p. 8.

7188 ⁴⁰³ Op. cit., at pp. 12, 13.

7189 One other item supporting this interpretation
7190 is an increase in the importance given to oral
7191 communication between the 1970s and today. In
7192 particular, while 83 percent of the urban bar
7193 today think oral communication is "extremely
7194 important" only 51 percent in the Zemans and
7195 Rosenblum sample thought "effective oral
7196 expression" was "extremely important." This
7197 shift is even more apparent if we examine the
7198 changes picked up in the partner survey.

7199 legal research, which was about the same; yet
7200 only 55 percent thought sufficient attention
7201 was provided in law school. The other
7202 practical skill areas mentioned above have
7203 similar gaps. There is perhaps a surprising
7204 gap in the teaching of procedural law. But
7205 the largest gap is in drafting legal
7206 documents, where the figures are 80 percent
7207 and 24 percent. Again the law schools get
7208 rather low marks for their instruction in
7209 writing skills.

7210 The responses also showed differences between lawyers
7211 depending on the practice setting about the subjects thought to be
7212 teachable. For instance:⁴⁰⁴

7213 Recent graduates currently practicing in firms
7214 of 10 or fewer lawyers were significantly (at
7215 a .01 level) more likely than those in larger
7216 firms to suggest that fact gathering and
7217 organization and management of legal work are
7218 skills that can be taught effectively in law
7219 school. Small firm practitioners are also

7220 ⁴⁰⁴ Op. cit., p. 14.

7221 significantly more likely (at a .001 level) to
7222 feel that client skills can be taught; 42
7223 percent of the respondents in firms of 10 or
7224 fewer lawyers compared to 31 percent of those
7225 in firms of 11 to 50 lawyers, 26 percent in
7226 firms of 51 to 200 lawyers and 19 percent of
7227 those in firms of over 200 lawyers feel that
7228 the ability to obtain and keep clients can be
7229 effectively taught in law school.

7230 Particularly, the rural lawyers surveyed seemed to want
7231 more from legal education.⁴⁰⁵

7232 The rural practitioners have much higher
7233 expectations for what "can be taught
7234 effectively in law school." For the areas of
7235 negotiation, counseling, understanding and
7236 conducting litigation, and organization and
7237 management of legal work, the rural
7238 practitioners gave much higher scores on what
7239 can be taught, and in almost all of those same
7240 practical areas gave lower marks to the law
7241 schools than did the urban lawyers. A

7242 ⁴⁰⁵ Op. cit., p. 15.

7243 striking example is organization and
7244 management of legal work, where a low 40
7245 percent of the urban bar and a rather high 74
7246 percent of the rural thought it could be
7247 taught effectively, and 16 percent of the
7248 urban and only 7 percent of the rural bar
7249 thought sufficient attention had been given in
7250 law school. The disappointment ratio was very
7251 high indeed for many rural practitioners.

7252 It is not surprising that lawyers see the gap. It is a
7253 gap dictated by the teaching methods generally employed by law
7254 schools. If the major gap is in communications skills, oral and
7255 written, that is not surprising when looking back at the Paper
7256 Chase model for legal education. Law students are being educated
7257 in large classes with little or no opportunity for feedback, for
7258 criticism of their oral or written presentations. And we know that
7259 law schools have not emphasized teaching of negotiation,
7260 counseling, fact-finding. The attention given to drafting legal
7261 documents is relatively small at most law schools and the areas of
7262 particular interest to small firm lawyers -- client skills,
7263 organization and management of legal work -- are neglected or,
7264 worse, disparaged as mere "trade school" subjects.

7265 But, if there is a gap, the bar exam has not been used to

7266 see that the gap is closed. There is, of course, the effort to
7267 develop skills examinations, attempted by the bar examiners in
7268 California, Colorado and Alaska.⁴⁰⁶ This approach has had
7269 difficulty, but experience may yet yield a workable approach. One
7270 difficulty is that these exams require evaluations which are at
7271 once more complex and expensive than grading which relies
7272 principally on young lawyers or machine grading. Moreover, the
7273 development costs (including validation) and the additional exam
7274 time required to administer the exam have discouraged its general
7275 use.

7276 The bar exam is the most traditional and most redundant
7277 element in the process through which students become lawyers
7278 because it is given in most states only after students have
7279 graduated from law school,⁴⁰⁷ and it is given largely on subjects
7280 offered in fundamental courses to first and second year law
7281 students. These subjects are the core subjects of law schools, and
7282 there is nothing very sophisticated in these subjects. Amazingly,
7283 there is not much that relates to service of clients beyond problem
7284 analysis, not much which relates to the day-to-day business of

7285 ⁴⁰⁶ Harbaugh, "Examining Lawyers' Skills," 59 The Bar
7286 Examiner 9 (Nov. 1990).

7287 ⁴⁰⁷ In Wisconsin, the bar exam is not required of the
7288 students who are graduates of Wisconsin law schools and Georgia
7289 allows students who have completed two years of law school to take
7290 the exam.

7291 lawyering, not much which relates to federal practice, even such
7292 universal subjects as federal tax. If an examinee can spot basic
7293 issues and write up a sound analysis in the areas of torts,
7294 contracts, property, criminal law, civil procedure and
7295 constitutional law, she can probably pass most bar exams.

7296 Law students understand this and that understanding is
7297 reflected in the gibe that preparing for the bar exam is simply
7298 "memorizing the Code of Hammurabi."

7299 The extension of the law student's ordeal which is
7300 represented by the bar exam is a very expensive process. It
7301 requires an extension of the period of preparation to be a lawyer
7302 of several months⁴⁰⁸ and this in a system which already calls for
7303 more formal education prior to practice of law than that of any
7304 other country. The applicant has to spend these months either in
7305 full time preparation or, more often, in exhaustive evening and

7306 ⁴⁰⁸ The average extension of time is between two and three
7307 and one-half months, assuming the student is successful on the
7308 first attempt. Actual graduation dates vary according to the
7309 particular school, and some schools allow for two or three
7310 different graduation dates throughout the year. Bar examination
7311 dates also vary according to the state, although a majority of the
7312 states administer the exam twice annually.

7313 In Florida, the exam is administered the last Tuesday and
7314 Wednesday falling within the months of July and February. The
7315 ethics portion of the bar exam is administered three times
7316 annually, usually within the two to three weeks following the bar
7317 exam and again during November.

7318 weekend study.⁴⁰⁹ Vast (and vastly profitable) enterprises -- the
7319 bar review courses -- have come into existence to prepare law
7320 students for the exam.⁴¹⁰ These courses, generally staffed by
7321 moonlighting law professors, have filled the void left by the
7322 obedience of law schools to the ABA accreditation standard. I have
7323 not found an acceptable method of calculating the opportunity cost
7324 of this bar preparation, but it must be vast.⁴¹¹

7325 For this expense, what is gained for the students, the
7326 profession or the public? I argue that there is not sufficient
7327 benefit to justify this cost. The bar review effort is largely

7328 ⁴⁰⁹ Many law school financial aid offices have recognized
7329 this added expense and created special loans to accommodate the
7330 student's needs. Lenders, recognizing yet another opportunity to
7331 capitalize on the desperate student, in conjunction with the
7332 financial aid offices, have created a supplemental post graduation
7333 loan or "Bar Loan." In Florida, a recent law graduate, in
7334 preparing to take the bar exam, may be eligible to receive a \$500
7335 to \$5,000 Bar Loan.

7336 ⁴¹⁰ Bar review course costs vary depending upon the state,
7337 the bar review company, comprehensive nature of the course and the
7338 time of enrollment. Generally, bar review course costs vary
7339 between \$700 to \$1300. These prices generally increase each year.

7340 I do not calculate into this cost the fee that the bar
7341 examiners charge for I assume that this fee pays for character and
7342 fitness review and that this will continue.

7343 ⁴¹¹ In attempting to calculate this cost, I considered such
7344 costs as the loss of potential income over the preparation period,
7345 the living expenses incurred, the review course costs, and other
7346 expenses related to taking the exam such as hotel costs incurred
7347 while taking the exam or hotel expenses included while taking an
7348 intensive bar review course immediately preceding the actual exam.

7349 devoted to memorization of rules and to testing technique and is
7350 devoid of any courses which will add to the students skills or
7351 provide new insights into the law. Most of the students' energy
7352 goes into rote memory exercises which quickly fade away after the
7353 exam.

7354 There is not even any clear evidence that the bar exam
7355 serves lawyers' more narrow interest in restricting entry for anti-
7356 competitive purposes. The studies which attempt to correlate
7357 passage rates and the profitability of practice have proven
7358 inconclusive.⁴¹²

7359 Moreover, the bar exam does not do very much to protect
7360 the public. Most important, most bar exams provide no screening to
7361 assure that the applicants are actually prepared to provide legal
7362 service to the public. If we believe that legal education has
7363 greatly improved, that the admissions process has been aided by the
7364 scientific methods of the Law School Admission Test, and that the
7365 minimum quality of law schools has been improved through the
7366 accreditation and inspection process, then we should accept the
7367 idea that law school graduates of accredited law schools are
7368 probably learning their basic course material. The pass rates for

7369 ⁴¹² Malcolm Getz, John Seigfried and Terry Colvani,
7370 "Competition at the Bar: The Correlation Between the Bar
7371 Examination Pass Rate and Profitability of Practice," 67 Virginia
7372 L.R. 863 (1981).

7373 first time test takers is high in most jurisdictions.⁴¹³

7374 At an earlier time, the bar exam was an important check
7375 on the law schools. There was not as much control on the quality
7376 of law schools and many schools were suspect because of high
7377 student faculty ratios and a "trade school" approach.⁴¹⁴ Bar
7378 exams operate principally as a check on the core academic program
7379 of the law schools and, because the exam is given at a time distant
7380 from the time students have taken the material (that is, the first
7381 and second years), it is a test of the student's long-term
7382 retention or reflective of the quality of the applicant's bar
7383 review course. The bar exam provides an additional check on legal
7384 education programs which are already scrutinized by the
7385 accreditation processes. It is a redundant system.

7386 ⁴¹³ The data indicates that the average pass rate for first
7387 time test takers in 1989 was 75.7%. That figure is down from the
7388 averages in earlier years.

7389 The drop in the rate of passing for first time examinees
7390 may be attributed to the growth of minority populations in law
7391 school and may reflect cultural bias in the bar exam process. That
7392 question, among others, is currently being studied by the Law
7393 School Admission Council.

7394 The jurisdictions where the pass rates are very low may
7395 be explained in various ways. California has a low percentage
7396 (65.3%), a fact which is often explained as the result of law
7397 schools operating without the ABA accreditation process.

7398 ⁴¹⁴ Of course, law schools have never had such an approach.
7399 Trade schools teach their students a craft and the charge that some
7400 schools were engaging in trade school practices is an entirely
7401 pejorative charge, insulting to the trade schools.

7402 Law schools have had major changes since the bar exam was
7403 established in its current form. Law schools today have developed
7404 an increased ability to screen out applicants and, because of
7405 continued competition for enrollment in law school, the will to
7406 reject applicants. The improvement in the process of law school
7407 admission has been matched by improvements in law school programs
7408 which teach the basic doctrine on which bar exams are largely
7409 focused.

7410 Is there anyone who can justify the way we conduct the
7411 bar exam today? Is there any reason to give the bar exam -- which
7412 is based largely on subjects taken in the first year -- so long
7413 after the courses are taught? Given the other screening mechanisms
7414 and the heightened accreditation standards, is there any reason to
7415 give the bar exam at all?⁴¹⁵

7416 As it stands today, the bar exam is the worst possible

7417 ⁴¹⁵ Dean B. G. Garth, Executive Director of the American Bar
7418 Foundation, makes a real point when he observes that some of the
7419 innovation found at the University of Wisconsin College of Law
7420 derives from the bar exam waiver for Wisconsin graduates. Garth,
7421 "Rethinking the Legal Profession's Approach to Collective Self-
7422 Improvement: Competence and the Consumer Perspective," Wisconsin
7423 Law School (1983). I could be persuaded that the bar exam should
7424 be abolished but I have not been persuaded that it is likely to be
7425 abolished. Perhaps the exam would be of greater utility if
7426 administered following the completion of the core curriculum as a
7427 means of testing the applicant's understanding of the basic legal
7428 principles and to gauge the law faculty's ability to teach the
7429 same.

7430 influence on legal education and a terrible drain on the energy and
7431 financial resources of law students. In short, the bar exam is the
7432 most conservative institution in the array of institutions which
7433 guard the gates of the profession, but it is an institution which
7434 offers some power to the profession for changing legal education.

7435 This power, of course, can be used for both good and
7436 evil. One reason legal educators are so skittish⁴¹⁶ about any
7437 mention of the bar exam in context of curricular reform is that it
7438 has been used in the past by lawyers and judges who have sought to
7439 force specific courses into the curriculum, as well as by those who
7440 have attempted to limit the admission of out of state lawyers.
7441 Many law professors and deans remember the fights over the attempts
7442 to force curricular changes by adding narrow subjects to the bar
7443 exam. Indiana and South Carolina were particularly brutal
7444 battlefields and there is a well founded fear that bar exams on
7445 narrow and provincial subjects will balkanize the process of
7446 training lawyers and admitting lawyers.

7447 As we look at changes in the bar exam, we must be careful
7448 to see that changes not limit initiative in the law schools nor
7449 serve the anti-competitive interests of lawyers by making admission

7450 ⁴¹⁶ The bar exam is largely despised by legal educators but
7451 much of what is despised -- the relatively superficial questions,
7452 the emphasis on compartmentalized doctrine -- has been produced by
7453 law professors who have drafted the questions.

7454 unreasonably difficult. We ought to be careful, but we ought not
7455 hold on to the exam as we know it today.

7456 The MacCrate Task Force of the ABA studied the bar exam
7457 and made these comments in its 1992 report:

7458 The traditional bar examination does
7459 nothing to encourage law schools to teach and
7460 law students to acquire many of the
7461 fundamental lawyering skills identified in the
7462 Statement of Skills and Values. If anything,
7463 the bar examination discourages the teaching
7464 and acquisition of many of those skills, such
7465 as problem solving, factual investigation,
7466 counseling and negotiation, which the
7467 traditional examination questions do not
7468 attempt to measure. For example, the
7469 examination influences law schools, in
7470 developing their curricula, to overemphasize
7471 courses in the substantive areas covered by
7472 the examination at the expense of courses in
7473 the area of lawyering skills. The examination
7474 also influences law students, in electing from
7475 among those courses offered, to choose
7476 substantive law courses subject of bar

7477 examination questions instead of courses
7478 designed to develop lawyering skills.
7479 Finally, the examination discourages law
7480 professors from integrating skills training
7481 into their substantive law courses.

7482 Over the years, critics of bar
7483 examinations have raised just such concerns
7484 about the danger that bar examinations will
7485 influence law schools, law professors and law
7486 students to take an unduly narrow approach to
7487 legal education. For example, a 1970 study
7488 undertaken by the AALS under the direction of
7489 Professor George Neff Stevens determined that
7490 "the selection of bar examination subjects
7491 does have a very definite effect upon law
7492 school curricula and on the legal education
7493 received by the applicant." A number of the
7494 law school deans polled in the course of that
7495 study indicated that their curricula were
7496 affected by bar examination, and many
7497 perceived that law students themselves were
7498 influenced by bar examination coverage in
7499 their choice of electives. One of the most
7500 frequent complaints about the impact of the

7501 bar examination was that it created a demand
7502 for course offerings on local law,
7503 particularly in the area of practice and
7504 pleading. Some respondents contended that
7505 because of the breadth of their coverage, bar
7506 examinations "needlessly inhibited educational
7507 experimentation." Some recommended that bar
7508 examinations shift their emphasis from
7509 comprehensive knowledge of legal rules to
7510 skills-testing.⁴¹⁷

7511 If the MacCrate report is correct, the question I want to
7512 ask is: Can the bar exam be changed to eliminate some of its
7513 problems (including its expense) and encourage curricular reform?

7514 Bar Examination on the Subjects of
7515 Professionalism and Poverty Law

7516 If we are thinking about reform of the bar exam, we ought
7517 to think about how it can be a tool to bring about a constructive
7518 conversation between the profession and law schools on the lawyers'
7519 duty to assure access to justice.

7520 ⁴¹⁷ Legal Education and Professional Development - An
7521 Educational Continuum, Report of The Task Force on Law Schools and
7522 the Profession: Narrowing the Gap, at p. 278-79.

Both law schools and the legal profession are concerned about the drift from "professionalism," yet lawyers are not prepared by their legal education to understand their oaths and few courses impact Dean Roscoe Pound's idea that a profession's primary purpose is the "[p]ursuit of the learned art in a spirit of public service."⁴¹⁸ Most law schools do very little to counter the economic message delivered principally by recruiters for the large corporate law firms and by the law professors who speak about the desirability of doing "interesting" work. Robert Stover's book, Making It and Breaking It, is a chronicle of his law student days which focuses on the "fate" of public interest commitment during law school, and he concludes that, through a variety of mechanisms, law school education tilts against public service.⁴¹⁹ Those mechanisms included law professors' references to the pecuniary aspects of law practice,⁴²⁰ their failure to discuss altruism,⁴²¹ the use of examples about rich and powerful clients⁴²² and other

⁴¹⁸ R. Pound, The Lawyer From Antiquity to Modern Times (1953), p. 5.

⁴¹⁹ Robert V. Stover (Edited by Howard S. Erlanger), Making It and Breaking It (Univ. of Illinois Press, 1989), p. xix.

⁴²⁰ Op. cit., p. 52.

⁴²¹ Op. cit., p. 59.

⁴²² Op. cit., p. 65.

social and peer pressures. As a result, he found that the number of students who hoped to do public service work declined by half during their law school careers⁴²³ and that there was a change in values and expectations:⁴²⁴

There was a decline in the desire to use one's position as an attorney to help others and to work for social and political change; there was a decline in the expectation that public interest jobs would in fact allow a beginning attorney to accomplish those altruistic goals; and there was a reduced expectation that public interest jobs would enhance long-term career prospects by providing a new attorney with valuable experience, knowledge, and contacts.

The students' preferences, Stover found, turned from public interest to "conventional business practice -- and especially for a job with a large corporate law firm."⁴²⁵ The

⁴²³ Op. cit., p. xix.

⁴²⁴ Op. cit., p. xix.

⁴²⁵ Op. cit., p. xix.

7567 leaders of the bar are often drawn from large corporate firms and,
7568 until recently, there has not been much initiative from those
7569 quarters to make changes. There is evidence that both practicing
7570 lawyers and legal educators desire change. One simple suggestion
7571 is for bar examiners to assure that new lawyers come to the bar
7572 with an understanding of their public obligation.

7573 I do not suggest any significant addition of doctrine to
7574 the bar exam, but if we are serious about lawyers being a
7575 profession which serves the public (including the poor), it is not
7576 far fetched to suggest that there is a function for the courts and
7577 the bar examiners to assure themselves that new lawyers are
7578 prepared for this service. I have no difficulty in envisioning a
7579 bar exam which, for instance, places poverty law topics (landlord
7580 tenant law, for instance) on the exam in place of, say, wills and
7581 estates.

7582 The substitution of poverty law subjects for other
7583 subjects would end the episodes we encounter today when tax lawyers
7584 and corporate lawyers, faced with possible pro bono service,
7585 suddenly acquire a modesty unknown to them in any other context and
7586 declare that they are simply not trained to provide service to the
7587 poor.

Offering the Bar Exam to Law Students

After the First or Second Year

One change which could be made without changing the content of the bar exam would be to change the time that we give the exams. We ought to question whether the bar exam, as presently constituted, should be administered so long after the courses on which it is based are taught. Other professions have developed standard tests on basic courses and administer those exams before graduation.⁴²⁶

I doubt that much bar exam material is learned by most law students in their third year. We should allow students to take the bar exam after the completion of the first or, perhaps, second year of law school. I do not propose that students be admitted to practice without completing law school but I do believe that they

⁴²⁶ A medical student, for instance, may take a portion of the national board exam immediately following the student's formal education, focusing primarily on basic science principles. Similar exams are administered following the student's completion of their internship and residency requirements, testing skills acquired therefrom.

Similarly, engineers and architects take a national examination immediately following their formal education, testing the basic principles of the respective professions. A second exam, focusing primarily on the practical skills of each profession, is administered following the applicant's requisite experience in the field. Engineers are required to gain four years of experience prior to taking the second examination, while architects must complete a one-year internship.

7616 could get the bar exam behind them much earlier and, hopefully,
7617 move on to courses which deal with more than legal doctrine and
7618 appellate case analysis.

7619 The bar exam exists to provide a screening against
7620 inferior legal education and bar examiners still advance this as
7621 the principal rationale for the bar exam. If this is the
7622 rationale, then principles of accountability will be advanced by
7623 giving the exam at an earlier time. The proposal to offer the bar
7624 exam to students still in school is based in large part on a
7625 recognition that the bar examiners and legal educators do not
7626 communicate very well and that neither of these groups recognizes
7627 the improvements in the other. I have already addressed the
7628 improvements in law schools and law school accreditation. Bar
7629 exams have also greatly improved.

7630 When bar examinations were first established, they were
7631 the only screen for those who sought to enter the practice of law,
7632 and in the early days applicants may not have had any formal legal
7633 education. In that context, the bar exam was an extremely
7634 important check on quality. As important as it was, it was a
7635 function performed somewhat cavalierly. Abraham Lincoln operated
7636 as an examiner and "after examining a prospective attorney (the
7637 examination consisting of a few cursory questions), wrote by way of

7638 approval:"⁴²⁷

7639 My dear Judge: 'The bearer of this is a young
7640 man who thinks he can be a lawyer. Examine
7641 him if you want to. I have done so and am
7642 satisfied. He's a good deal smarter than he
7643 looks to be. Yours, Lincoln.'

7644 With time, the bar exam has progressed from what was once a
7645 relatively casual interview with the local judge⁴²⁸ into an

7646 ⁴²⁷ W. Frank Newton, "Law School Role and Fitness of
7647 Graduates Revisited," 60 The Bar Examiner (No. 4) Nov. 1991.

7648 ⁴²⁸ After several years of study with lawyers, Andrew Jackson
7649 appeared before two judges who, after examining him, admitted him
7650 to the North Carolina Bar. Robert V. Remini, The Life of Andrew
7651 Jackson (Penguin Books, New York, 1988) pp. 10-12. Before that,
7652 during the Colonial period, Professor Friedman reports:

7653 Each colony had its own standards for
7654 admission to the bar. New Jersey even
7655 attempted to set up a graded profession on the
7656 English model. By a rule of 1755, the
7657 colony's supreme court established the order
7658 of 'serjeants-at-law,' a higher rank than the
7659 ordinary counselor. Only the court could
7660 appoint to this rank; the court later
7661 restricted the number of serjeants to twelve.
7662 The serjeants had the power and duty to
7663 conduct examinations for admission to the bar.
7664 In Virginia, a law of 1748 vested control over
7665 licensing and admission to the bar in the
7666 highest court of the colony. In
7667 Massachusetts, in the 18th century, each court
7668 admitted its own lawyers. The rank of
7669 barrister was established in 1762, and twenty-
7670 five lawyers were thereupon called to this

enterprise which now involves academic lawyers and practicing lawyers functioning in a realm of multi-state bar exams, bar examiner reviews for test validity, scrutiny for racial bias, and constant criticism. Legal educators should recognize that most exams are competent measures of basic legal knowledge. The bar examination is a method for establishing accountability of legal education, and, since the bar exams have greatly improved as a test for basic doctrine, it is not so easy to say that the bar exam is of no concern to the law schools.

Law schools, which have sought to be aloof from the bar exam, should accept the idea that the law schools do prepare students to take the bar examination. This is not the most important function of law schools, but it is a function. Ideally, a law school should educate a student to take an exam which indicates an applicant's ability to perform as an attorney. The problem, however, is that no matter how scientific, a standardized test can not serve as an indicator of an applicant's ability to practice law.

rank. In Rhode Island, any court could admit; but admission to one was admission to all. In many colonies, the requirements for admission included a long period of apprenticeship, though in some colonies, college graduates had to serve a lesser time.

Lawrence M. Friedman, A History of American Law (Simon and Schuster, 1988), p. 86. (Citations omitted.)

7698 In 1975, ABA President Justin Stanley suggested that bar
7699 examinations be in two parts. The first would be standardized
7700 nationally and would test analytical, lawyering and writing skills,
7701 and understanding of professional responsibility. The second part
7702 would be unique in each state, testing on such matters as the state
7703 judicial system, local laws, and procedures and rules. This idea
7704 should be revived and debated in the context of an early
7705 administration of the exam.

7706 Erica Moeser, Executive Director of the Board of Bar
7707 Examiners in Wisconsin, makes a case for a national bar exam,
7708 administered while the students are in law school, as a tool for
7709 law schools and students:

7710 There are legitimate questions concerning
7711 the timing and content of bar examinations. A
7712 case can be made for a national licensing test
7713 that is administered before a law student has
7714 completed his or her legal education. This
7715 would allow the law schools to truly complete
7716 their educational mission; the current
7717 disassociation that occurs because the
7718 unsuccessful bar examinee is "history" at the
7719 law school would be eliminated. If
7720 administered on a national basis, such a test

7721 would provide a powerful assessment tool as to
7722 each law school; more importantly, it would
7723 permit the law school to intervene and
7724 remediate, or to attrit, as appropriate.⁴²⁹

7725 Note the theme of accountability. Under her proposal,
7726 law schools as well as students would be assessed and the
7727 accountability to law students strengthened. The bar exam given
7728 while students are still in school will do much to further the
7729 legitimate purpose of the bar exam. If we were to allow a bar exam
7730 on basic subjects to be offered after the first or even the second
7731 year of law school, we would begin to draw a bright line between
7732 the type of courses which would be offered in law school before the
7733 exam and the subjects emphasized after students get doctrine behind
7734 them. When the bar exam is out of the way, students would not
7735 accept a curriculum built entirely on the continued study of
7736 appellate cases -- they would demand more. Hopefully, law schools
7737 will demand more of them. I believe that clinical programs and
7738 advanced inter-disciplinary courses would blossom if students were
7739 able to place the learning and testing of basic legal doctrine
7740 behind them.

7741 In making this suggestion, I do not deny a place for the

7742 ⁴²⁹ Erica Moeser, "Some Reflections on Bar Admissions,"
7743 Syllabus () p. _____.

7744 Langdellian method of teaching "thinking like a lawyer" or even the
7745 teaching of doctrine. I merely say that the place for this method
7746 should not be as large as it is today. We have very bright law
7747 students today and we need not take three years of their lives and
7748 many thousands of their dollars to teach them to "think like
7749 lawyers." That task is largely done by the end of their first
7750 year, and if we don't know that, they do.

7751 I do not propose that law students be admitted after they
7752 pass this bar exam. Law students should finish three years of law
7753 school before being admitted to the full practice of law. I take
7754 this position not because I believe that a great deal of what goes
7755 on in the third year of law school is all that useful, but because
7756 I believe that reform is possible and because I have very little
7757 faith in the commitment of the bar and the judiciary to the
7758 training of young lawyers. I fear that there is far less energy
7759 expended by lawyers and judges to train young lawyers than there
7760 was thirty years ago, when I entered the profession. Even the
7761 large corporate firms which are often touted as the best place to
7762 receive training do not do a very good job at training young
7763 lawyers, focusing instead on their productivity.

7764 We should consider a multi-state exam on basic doctrine
7765 at the end of the first year much in the way that medical education
7766 administers a basic science exam at the end of the basic sciences

study.⁴³⁰ This was the first part of the idea advanced by Justin Stanley in 1975 and is consistent with Erica Moeser's suggestion. As an alternative to the second part of Justin Stanley's program, the testing for state law, we might consider allowing the law schools to administer a comprehensive exam at the end of law school to assure that the law graduate is prepared to provide basic legal services to clients. The law school comprehensive exam might be partially a skills examination, a demonstration of the student's ability to function as a lawyer, and it could be an exam to determine if the law student is prepared to profess and to serve clients.

Such a test might inquire into the student's abilities to analyze a client's problems without doctrinal category labels (tort, contract, etc.). It might test the applicant's ability in client counselling, knowledge about alternative dispute resolution and other subjects. As suggested above, this exam might also test knowledge about legal subjects related to the lawyer's public service obligation and preparation to provide legal services to the poor.

⁴³⁰ Harry S. Jones, Sylvia I. Etzel and Barbara Barzansky, "Educational Programs in U. S. Medical Schools," 266 Journal of the American Medical Association Number 7 (Aug. 7, 1991), pp. 913, 920.

Where Law Students Complete Programs

Which are Enriched by Extensive Skills Training,

the Bar Exam Should be Waived

There are problems with offering the bar exam after the first or second year of law school and the principal problem is that preparation for the bar exam might interfere with legal education at some law schools. I believe that this is a minimal risk and there are ways to accommodate these problems, but it is at least useful to think about other ways that the bar exam might be made into a more useful instrument for educating lawyers. One way to think about the bar exam is to think about the possibility that it might have the greatest utility if courts will accept the idea that, where greatly enriched legal education is provided to a student, completion of that more rigorous course will earn a waiver of the exam.

The bar exam does hang over law students' heads as a large expense and inconvenience, and it also holds some considerable terror. Any mention of the bar exam at a graduation ceremony is certain to draw nervous laughter. By their third year, law students know stories of some brilliant student who failed the bar exam and the possibility of humiliation is bound up with the dread of the rote memory studies to create real dread of the bar exam in the minds of law students. Bar examiners could develop a

7812 process for waiver without departing from the present timing of the
7813 bar exam or changing the subjects on which it tests. Indeed, the
7814 program to waive the bar exam might work better if the bar exam is
7815 not changed. The more horrible and duplicative it is, the more
7816 students will want to avoid it and a waiver program may be most
7817 efficient where the exam is worse.

7818 The function of the bar exam is as a check on legal
7819 education to insure that law graduates meet certain minimum
7820 standards before being admitted to the bar. The courts which
7821 control the admission of lawyers should offer a waiver of the bar
7822 exam to law students who demonstrate that their program of study
7823 included sufficient training in doctrine and analysis, and, beyond
7824 that, extensive clinical work which trained them in the range of
7825 lawyering skills, training in professionalism, etc. A law school
7826 program which greatly exceeds the accreditation standards, provides
7827 sufficient teaching faculty and other resources to train students
7828 through closely supervised programs, and provides frequent
7829 opportunities for critical review and substantial skills training
7830 should produce students who are better prepared for practice.
7831 Students who complete those programs will have been more closely
7832 observed and educated in a more rigorous manner and will have been
7833 much more involved in the course of study than the students who
7834 were taking more of the same type of courses taught in the first
7835 year of law school. The students who have had a more enriched

7836 clinical training should be much better prepared to serve clients
7837 and the bar exam is not so essential as a "checking" mechanism.

7838 This may sound somewhat like the old practice of "diploma
7839 privilege," under which graduates of the law schools within a state
7840 are not required to take the bar exam but graduates of out of state
7841 schools were required to pass the exam. I do not advocate blanket
7842 waiver for all students who graduate from the law schools in a
7843 particular state but rather a waiver based on the demonstrated
7844 special quality of the law school program.

7845 I anticipate some of the objections:

7846 It will be argued that such a program will set up another
7847 accreditation process, expensive to administer;⁴³¹ that any
7848 program to set up categories of law schools will balkanize legal
7849 education;⁴³² that law schools will be drawn into a "trade school"
7850 model and away from the university; that too much power will be
7851 placed into the hands of the bar examiners, the courts or others to
7852 decide what programs will qualify for waivers. Since this proposal

7853 ⁴³¹ Law school programs which seek approval should bear the
7854 burden of proof and any expense.

7855 ⁴³² We already have categories of law schools: non-ABA
7856 accredited, ABA accredited, AALS accredited, AALS accredited with
7857 Order of the Coif, etc.

DRAFT -- JULY 28, 1993
Chapter Thirteen

7858 does not seek to require anything from law schools, but merely to
7859 allow law schools to seek waivers for enriched programs, it is hard
7860 to see how there is injury.

7861 Objections will come from some bar examiners as well.
7862 There is understandable reluctance to create exceptions to the bar
7863 exam and to develop the process for evaluating the special
7864 programs. Of course, bar examiners need not be involved in that
7865 process just as they are not now involved in the accreditation of
7866 law schools. Since the very idea for waiver is built on the
7867 foundation of criticism of the bar exam, it is possible that bar
7868 examiners would have some hostility and it may even be better for
7869 others to review the enriched law school programs.

7870 I see a discussion about waiver of the bar exam as a
7871 discussion about the role of legal education and about the function
7872 of the bar exam. If that function is to check up on law students
7873 and law schools to assure that students are prepared to serve the
7874 public, then a waiver program can provide an incentive to law
7875 schools to demonstrate innovative programs and to gain recognition
7876 for that innovation. In a review of law school programs to give a
7877 waiver for the bar exam, it is very likely that most law students
7878 from schools like the University of New Mexico, New York University
7879 or Northeastern, which have intensive skills training programs,
7880 will qualify, but most students from other schools, including most

7881 of the so called elite law schools, will not.

7882 If this waiver idea were to be seriously considered,
7883 there are a number of questions which would have to be resolved,
7884 beginning with the fundamental question: What types of programs
7885 should qualify for bar exam waiver? My preference would be to
7886 answer this question generally, saying that programs will qualify
7887 by demonstrating that they provide sufficient education (and
7888 testing) in the basic subjects to assure knowledge of basic
7889 doctrine and, additionally, sufficient exposure to the skills and
7890 values of the profession to assure that the student is prepared to
7891 enter the profession. This formulation would stay away from any
7892 limitations by subject areas so that intensive programs centered
7893 around criminal law, juvenile law, property, tax or international
7894 law all might qualify.

7895 The development of the curricula for these law school
7896 programs and development of criteria for evaluating them can be
7897 drawn from several sources. In 1943 Harold Lasswell and Myres
7898 McDougal observed that legal education, "despite much recent
7899 ferment and agitation," had not changed much for the better,⁴³³
7900 but instead had been a "transition from lectures, to the analysis

7901 ⁴³³ Harold D. Lasswell and Myres S. McDougal, "Legal
7902 Education and Public Policy: Professional Training in the Public
7903 Interest," 52 Yale L.J. 203 (March 1943).

of appellate opinions, to confusion."⁴³⁴ Their call was for directing law schools toward public policy,⁴³⁵ but they also wanted to train law students to be lawyers based on a "job analysis" of the profession. They even began that analysis to guide the development of the law school curriculum:⁴³⁶

Drafting, promoting, interpreting, and amending constitutions.

Drafting, promoting, and interpreting executive orders, administrative rulings, municipal charters, and so on, and attacking or sustaining their constitutionality.

Drafting and interpreting corporate and private association charters, agreements, dispositive instruments, and so on, and attacking or sustaining their validity.

⁴³⁴ 52 Yale L.J. pp. 203, 204.

⁴³⁵ "What is needed now is to implement ancient insights by reorienting every phase of law school curricula and skill training toward the achievement of clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility." 52 Yale L.J. p. 207.

⁴³⁶ Op. cit. pp. 209, 210.

7926 Deciding or otherwise resolving causes or
7927 controversies, and making other decisions
7928 which affect the distribution of values, as
7929 judges, executives, administrators,
7930 arbitrators, referees, trial examiners, and so
7931 on.

7932 Bringing to, or obscuring from, the attention
7933 of decision-makers the facts and policies on
7934 which judgment should rest.

7935 Advising clients on how to avoid litigation
7936 and controversies and on how to make the best
7937 possible use of legal doctrines, institutions,
7938 and practices for the promotion of their
7939 private purposes and long-term interest.
7940 (Clarifying, inter alia, intentions as to
7941 property disposition, business transactions,
7942 and family relations).

7943 Consulting and negotiating with clients,
7944 businessmen, opposing counsel, and decision-
7945 makers of all kinds.

7946 Guiding, conducting, and preparing for

7947 investigations and hearings (criminal,
7948 regulatory, legislative, social-scientific,
7949 administrative).

7950 Preparing arguments, legal forms, witnesses
7951 (ordinary, expert), trial briefs, and so on.

7952 Selecting courts, juries, arbitrators,
7953 negotiators, and other decision-makers.

7954 Selecting clients.

7955 Selecting clerks, associates and successors.

7956 Preparing or supervising press conferences,
7957 issuing news releases, preparing radio
7958 material, or newsreel material.

7959 Developing influence through participation in
7960 civic and other public activities (organizing
7961 and directing pressure groups, lobbying
7962 propaganda, and other control procedures) and
7963 private sociability.

7964 Participating in professional organizations

(organizations engaged in selection, exclusion and training of members, and with the maintenance of standards of varying degrees of ambiguity).

Contributing by investigation, writing and lecturing to legal and social science (publishing facts and analyses of the relationship between legal rules and human relations; reformulation of legal rules).

A more recent analysis was done by the ABA Section on Legal Education and Admission to the Bar 1992 "MacCrate Task Force" report, through its "Statement of Fundamental Lawyering Skills and Values" which catalogs ten skills and four values, as follows:

Skills:

1. Problem solving;
2. Legal Analysis and Reasoning;
3. Legal Research;
4. Factual Investigation;
5. Communication;
6. Counseling;
7. Negotiation;

- 7986 8. Litigation and Alternative Dispute Resolution
7987 Procedures;
7988 9. Organization and Management of Legal Work;
7989 10. Recognizing and Resolving Ethical Dilemmas.

7990 Values:

- 7991 1. Provision of Competent Representation;
7992 2. Striving to Promote Justice, Fairness and Morality;
7993 3. Striving to Improve the Profession;
7994 4. Professional Self-Development.

7995 These fourteen items (each developed in more detail in
7996 the statement) can be the beginning point for developing and
7997 evaluating law school programs. In looking over the list, it is
7998 apparent that some law school programs do begin to train students
7999 in many of these skills and values. It is equally apparent that
8000 many students graduate from law school with little or no exposure
8001 to most of these skills and values.

8002 Another approach to the definition of the skills and
8003 values law school programs should include in order to qualify for
8004 a bar exam waiver is to look at the extensive work done in the
8005 development of the so-called "bridge-the-gap" programs developed
8006 for entering lawyers in many states. Although these are,

8007 typically, lecture-type programs, the areas of lectures may provide
8008 some guidance to those who wanted to create special law school
8009 programs. The MacCrate Commission discussed "bridge-the-gap"
8010 programs:⁴³⁷

8011 Topics covered. The most common type of
8012 bridge-the-gap course offers a series of
8013 lectures on substantive areas combined with
8014 detailed state-specific practice hints.
8015 Typical areas include bankruptcy, civil
8016 litigation, corporations (small business),
8017 estate planning, wills and probate, criminal
8018 law, ethics, family law, real property, and
8019 workers' compensation. Other topics often
8020 found in bridge-the-gap programs include
8021 taxation and insurance law. A less common
8022 topic is law office management. Some courses
8023 introduce new lawyers to the procedures used
8024 in the local judicial system. Few programs
8025 address lawyering skills, and those that do
8026 typically utilize a static lecture format
8027 without interactive training. A handful of

8028 ⁴³⁷ Legal Education and Professional Development - An
8029 Educational Continuum, Report of The Task Force on law Schools and
8030 the Profession: Narrowing the Gap, at page 290-91.

8031 bridge-the-gap courses try to include an
8032 amalgam of substantive law, office management,
8033 procedure, and lawyering skills, and offer
8034 lectures on different topics in these four
8035 areas.

8036 In 1988, a study of "bridge-the-gap" programs was done by
8037 the American Law Institute-American Bar Association Committee on
8038 Continuing Professional Education in 1988, and it resulted in the
8039 statement of a "Model Curriculum" which included this list of sub-
8040 skills:⁴³⁸

- 8041 • Listening and Observing
- 8042 • Analyzing and Interpreting Behavior
- 8043 • Creating Conditions for Effective Communication
- 8044 • Responding and Reacting Skillfully to Others
- 8045 • Using Acceptable Language and Grammar
- 8046 • Organizing Information
- 8047 • Speaking Effectively
- 8048 • Questioning Effectively
- 8049 • Identifying and Evaluating Relevant Facts
- 8050 • Identifying and Evaluating Legal Issues

8051 ⁴³⁸ American Law Institute-American Bar Association Committee
8052 on Continuing Professional Education, A Model Curriculum for
8053 Bridge-the-Gap Programs, Discussion Draft (1988) at 13.

- Analyzing and Selecting Appropriate Options
- Designing and Implementing a Plan of Action

I have already noted the tendency of these programs to rely principally on lectures, but there has been some thinking about a more useful approach to "bridge-the-gap" and the MacCrate Report commented on work done by Professor Marilyn Yarbrough for the American Law Institute-American Bar Association Committee on Continuing Professional Education:⁴³⁹

The ALI-ABA Committee developed a pilot Bridge-the-Gap Real Estate Training Module (the "real estate training module") as an example of how Professor Yarbrough's recommendation might be implemented. The real estate training module is a skills training program that uses "simulation learning" with role playing. It introduces new lawyers, including those with general practice experience, to the special problems associated with real estate acquisitions and sales. The participant solves problems within the context

⁴³⁹ Legal Education and Professional Development - An Educational Continuum, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap, at page 303.

8077 of an actual real estate transaction. The aim
8078 of the real estate training module is not to
8079 teach substantive law, but it does provide
8080 references to background material. The
8081 training module deals with negotiating
8082 different aspects of the transaction and
8083 drafting the contract of sale, and teaches the
8084 skills of interviewing, transaction planning,
8085 and drafting. The course materials include a
8086 fact pattern in the form of a memo from a
8087 partner to an associate, as well as sample
8088 contracts. It addresses relevant issues,
8089 including financing concerns and questions of
8090 professional responsibility.⁴⁴⁰

8091 This proposal by Professor Yarbrough parallels
8092 suggestions by Professor Stuart Gullickson whose ideas were
8093 recently summarized as follows:

8094 Stuart Gullickson, professor of law at the
8095 University of Wisconsin and a national and
8096 international bridge-the-gap expert, has

8097 ⁴⁴⁰ American Law Institute-American Bar Association Committee
8098 on Continuing Professional Education, Bridge The Gap Real Estate
8099 Training Module, Student Manual, Draft No. 5, April 1, 1991
8100 (submitted to the Advisory Committee April 19, 1991).

8101 proposed perhaps the most ambitious program of
8102 this sort. His ideal curriculum consists of
8103 skills training (e.g., negotiating,
8104 interviewing, drafting, etc.); task training
8105 (e.g., probating estates, organizing
8106 corporations, preparing litigation, etc.);
8107 professional responsibility; law office
8108 economics; quality of life; and
8109 professionalism.

8110 Gullickson thinks that the only way to learn
8111 how to practice law is "to do it yourself
8112 under supervision over and over," and his
8113 proposed curriculum provides new lawyers with
8114 just that opportunity. Under his proposal,
8115 classes would be taught, not in large lectures
8116 or through Socratic dialogue, but by example,
8117 either simulated or real. In the ideal world,
8118 clinical experience would follow simulation
8119 exercises. Classes would be small and meet
8120 over long periods of time to allow for direct
8121 supervision of each student, prompt feedback,
8122 and frequent repetition.

8123 In addition to providing training in skills

8124 and tasks, the curriculum would cover
8125 lifestyle issues. Quality-of-life classes
8126 would teach incoming lawyers how to deal with
8127 stress and non-traditional priority schemes
8128 (such as, lawyer-parents who view children,
8129 rather than clients, as their highest personal
8130 priority). Professionalism training would
8131 cover courtroom manners, pro bono obligations,
8132 and related topics. The program is designed
8133 to address the whole person's life.⁴⁴¹

8134 These subject areas in which new lawyers need to be
8135 trained can be read with the MacCrate Task Force Statement of
8136 Skills and Values to provide an excellent starting place for the
8137 design of a law school curriculum which will qualify for a waiver
8138 program. The board of bar examiners and the courts which
8139 ultimately control admission of lawyers should examine the purpose
8140 of the bar exam and attempt to develop general standards which, if
8141 met by such an enriched law school program, would justify the
8142 waiver of the bar exam for graduates of such a program.

8143 ⁴⁴¹ Anne Rossheim, Bridge-The-Gap Training for New Lawyers:
8144 Much Interest, Less Action (Prentice Hall Law and Business, Nov.,
8145 1990) (available on Westlaw in TP-ALL Database Citation 10 No. 11
8146 PH-LWH 8).

8147 If the bar exam can be waived by taking the enriched
8148 clinical courses, there is a real prospect that the demand for
8149 these courses will increase and that law schools will respond to
8150 the demand.

8151 All of this raises resource questions because the
8152 enriched program will be more expensive than the lecture style of
8153 teaching and even small seminars do not require the teaching
8154 resources that clinical programs require. Where will law schools
8155 get these resources?

8156 The short answer is that I do not know, but law schools
8157 face a severe resource problem even if we do not add the pressure
8158 for more clinical programs which is likely to come with a waiver
8159 program. There is the possibility that the resources could come in
8160 part from the students who are paying now for legal education and
8161 then paying in time and money for a bar exam. Since bar review
8162 courses cost over one thousand dollars in hard dollars, plus a
8163 great amount of time, special programs could be developed and
8164 funded through these resources. To give an example: If the law
8165 school were to work with the bar to develop a very intensive summer
8166 program of skills training with tuition pegged at the level of
8167 regular tuition plus the cost of a more expensive bar review
8168 course, students desiring waiver of the exam would be attracted and
8169 the resources which now go into videotape lectures and the teaching

8170 of doctrine could be reclaimed for a program which teaches students
8171 something new and prepares them to serve clients.

8172 One way to experiment with this idea is to prepare an
8173 intensive course which might qualify for a waiver of the bar exam.
8174 I offer these thoughts for a program largely patterned on the
8175 National Institute of Trial Advocacy programs, using role playing,
8176 close supervision and opportunities for videotaping of oral
8177 exercises, multiple writing exercises and extensive feedback. I
8178 propose such a model curriculum only as a point of departure for
8179 anyone who will sit down and do the serious work to develop such a
8180 program.

8181 Before outlining the program, I want to make it clear
8182 that it should be taught, not in the leisurely way we teach most of
8183 law school, offering students courses taught for an hour each
8184 Monday, Wednesday and Friday⁴⁴², but through students' involvement
8185 in their subjects in a most intensive way throughout the week.
8186 Again drawing from the NITA techniques, I contemplate that they
8187 would perform exercises, undergo critiques, watch demonstrations
8188 and listen to a variety of experienced professionals describe their

8189 ⁴⁴² This arrangement has a great deal of value for much of
8190 legal education, but it is not the best way to teach the skills and
8191 values which I hope can be taught in the special program.

8192 approach to the various tasks.

8193 The second point I want to make is that many segments of
8194 the courses need not be taught by law professors or even by lawyers
8195 for there are many others in the academy who are far better
8196 equipped to teach in some of these areas. Indeed, one of the
8197 reasons to propose that we experiment with a summer course is that
8198 it would ease the problem of involving professors from other
8199 disciplines, many of whom do not have summer contracts.

8200 Finally, the substantive courses of importance to bar
8201 examiners can be woven into much of this program.

8202 In the sketch of a proposed nine-week course below, I
8203 include the course, a brief description of the mission, a
8204 suggestion for other disciplines which might be invited to help
8205 teach such a course, writing assignments which might accompany the
8206 exercises and the areas of substantive law which might be
8207 emphasized in the week's offerings:

8208 Week 1. Interview, counseling (including crisis counseling).

8209 Mission: To train students in interviewing
8210 with an emphasis on client interviews and
8211 counseling techniques with a particular
8212 emphasis on counseling people in crisis.

8213	<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
8214	Communications,	Letters to clients,	Criminal Law,

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8215 Psychology, Social reports of interviews Torts, Wills and
8216 Work, Nursing, Etc. Estates, Evidence

8217 Week 2. Negotiation.

8218 Mission: To teach students the skills of
8219 negotiation through lectures, demonstrations,
8220 role playing exercises and critiques.
8221 Emphasis on ethics of negotiation.

8222	<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
8223	Communications,	Demand letters,	Contracts,
8224	Business, Psychology	responses, settlement	Property
8225		agreements	

8226 Week 3. Factual investigation.

8227 Mission: To teach students the methods of
8228 factual investigation through lectures, role
8229 playing and research exercises.

8230	<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
8231	Criminology, Medicine,	Reports, evaluations	Criminal Law,
8232	Nursing		Torts, Evidence

8233 Week 4. Alternative Dispute Resolution/Mediation.

8234 Mission: To acquaint students with the
8235 alternatives of dispute resolution and to
8236 train them so that they become certified
8237 mediators (40 hours of training).

8238	<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
8239	Communications,	Letters to clients	Torts, Contracts,
8240	Psychology	explaining alterna-	Property
8241		tives, draft awards,	
8242		settlement agreements	

8243 Week 5. Oral Presentation. (Perhaps through NITA trial
8244 exercises.)

8245 Mission: To teach students effective
8246 presentation of the types lawyers are
8247 frequently called to perform.

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8248	<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
8249	Drama, Communications	Critiques, including	Torts, Criminal
8250		self critiques	Law, Evidence

8251 Week 6. Office Management/Ethical Duties.

8252 Mission: To expose students to the business
8253 arrangements necessary for the practice of law
8254 including those which involve ethical duties
8255 to clients such as trust fund accounting, fee
8256 arrangements, etc.

8257	<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
8258	Business, Accounting	Drafting attorney-	Contracts,
8259		client contracts,	Property,
8260		employment contracts,	Professional
8261		leases, etc.	Responsibility

8262 Week 7. Real Estate/Landlord Tenant. (Consider the materials
8263 developed by Professor Marilyn Yarbrough.)

8264 Mission: To train students in basic real
8265 estate transactions, including landlord/tenant
8266 law.

8267	<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
8268	Business, Accounting	Drafting real estate	Property,
8269		documents, drafting	Contracts, Civil
8270		pleadings in landlord/	Procedure,
8271		tenant cases	Evidence

8272 Week 8. Family Law.

8273 Mission: To train students in basic problems
8274 in domestic relations, including divorce and
8275 child custody.

8276	<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
8277	Social Work,	Separation agreement,	Family Law,
8278	Psychology, Medicine	pre-nuptial agreement,	Property,
8279	and Nursing	pleadings, memoranda	Contracts, Civil
8280		for family law problems	Procedure,
8281			Evidence, Tax

8282 Week 9. Business Law.

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Mission: To expose students to basic problems of business, including basic accounting principles, incorporation, elementary business organization, including financing.

<u>Other Disciplines</u>	<u>Writing Exercises</u>	<u>Substantive Areas</u>
Business, Accounting	Drafting incorporation agreements, partnership agreements, loan agreements, etc.	Contracts, Tax, Business Organization, Property

As I review this sparse outline, I know that many details would have to be filled in and that there are many possibilities for other subjects. I have put forward my plan by looking over the suggestions made by others and with the thought that available material could be used. For instance, week 4 on dispute resolution can be picked up from existing courses which are very well structured and week 5 could be a NITA exercise. The property segment proposed for week seven can be built on the work already done by Professor Marilyn Yarbrough and Professor Stuart Gullickson.

Since this course is proposed as an alternative to the bar exam (and the largely wasted bar review courses in which nothing much new is taught), I have attempted to include substantive law emphasis in the development of the problems and I see this as the review process which should substitute for any possible benefit in the present bar exam arrangement. As I view this program, the students will be informed of the substantive areas which they must command in order to successfully participate

8310 in the exercises and the law faculty will be responsible for
8311 continuous inquiry into the student's knowledge of the law (learned
8312 in the basic law courses) and ability to apply it. The program
8313 outlined assures that there will be review of most of the subjects
8314 now offered on the bar exam and that the review will be in context
8315 of applying knowledge of those subjects.

8316 Obviously, such a course of study contemplates a much
8317 more intensive faculty role than most of law school and the
8318 question which frustrates innovation in law school is the resource
8319 question.

8320
8321 Another approach to the resource question is to look to
8322 the bar associations which have already given their support for
8323 bridge-the-gap and continuing legal education programs, some of
8324 which could be adopted for an enriched law school curriculum.
8325 Finally, the resources might come from lawyers. The tradition of
8326 American lawyers is to provide education for other lawyers with no
8327 payment or, at most, a modest honorarium and many very skilled
8328 lawyers give substantial time to the National Institute of Trial
8329 Advocacy and other very good training programs. It is even
8330 possible that the large law firms and government offices could take
8331 a critical look at their efforts to educate new lawyers and be
8332 brought to see the law schools as the best place to begin this

8333 training.⁴⁴³

8334 The thoughtful advocates of law school reform, like
8335 Harold Lasswell, Myers McDougal and Jerome Frank (who wrote about
8336 schools for lawyering,⁴⁴⁴) have complained that Langdell's system
8337 has a firm and unfortunate hold on legal education. Dean Dick
8338 Julin, the former Chair of the ABA Section of Legal Education and
8339 the former President of the Association of American Law Schools,
8340 has referred to the same problem when he refers to "Fortress
8341 Langdell." My question is: How are we going to assault Fortress
8342 Langdell? How long will we wait for Jerome Frank's ideas on a
8343 "lawyering school" to be absorbed? Is the exceptional work of the
8344 MacCrate Task Force report (1992) to remain on the shelf like other
8345 earlier reports? How do we promote incentives for change? I
8346 believe that the early bar exam and/or a procedure to waive the bar
8347 exam for students who have completed enriched courses of study can
8348 be powerful forces to change legal education.

8349 ⁴⁴³ Law firms now spend vast resources subsidizing bar exam
8350 study and most large firms provide several weeks more time to study
8351 for the exam. They would be far better served by having their
8352 lawyers come to them already prepared.

8353 ⁴⁴⁴ Jerome Frank, "A Plea for Lawyer-Schools," 56 Yale L.J.
8354 1303 (1947).

Chapter Fourteen

TEACHING THE CIVIL RELIGION

The previous chapters have argued for reform of the law school curriculum and the teaching of skills, but there is a more important issue -- the teaching of values. I have earlier confessed that I accept the view that law serves as America's civil religion, "one to which all of the diverse religious and cultural groups can give allegiance."⁴⁴⁵ Professor Daniel John Meador, who wrote those words, also observed:

Still today, if motorists leave the interstate highways and drive through the centers of the county seats from coast to coast, they will usually find the courthouse at the heart of the town, the most impressive public building. Churches are usually there also, reflecting the reality that law and religion were central concerns of those who settled and built this country.⁴⁴⁶

Over many generations, Americans have affirmed their

⁴⁴⁵ Daniel John Meador, American Courts 77 (West Publishing, Co. 1991).

⁴⁴⁶ Id.

8377 faith in this secular religion. Professor Sanford Levinson
8378 analyzes this as a religion built around reverence for a special
8379 text -- the constitution:⁴⁴⁷

8380 This veneration has been urged by our national leaders.
8381 Sanford Levinson observes:

8382 Indeed, Washington's Farewell Address,
8383 given to coincide with the ninth anniversary
8384 of the adoption by the Philadelphia Convention
8385 of the constitutional draft, included the plea
8386 that "the Constitution be sacredly
8387 maintained." And a later president-to-be,
8388 Abraham Lincoln, in his own way as much a
8389 Founder as Washington, Madison, or Jefferson,
8390 would summon the populace to adopt the
8391 principle of "reverence for the laws" as the
8392 "political religion of the nation." "Every
8393 American, every lover of liberty, every well
8394 wisher to his posterity," Lincoln asserted,
8395 must "swear by the blood of the Revolution,
8396 never to violate in the least particular, the
8397 laws of the country; and never to tolerate

8398 ⁴⁴⁷ Levinson, supra, note __*, at 11.

8399 their violation by others." All laws should
8400 be "religiously observed."⁴⁴⁸

8401 This religion has its own powerful symbols -- principally
8402 the flag -- and it has a creed known and recited by most
8403 Americans -- the Pledge of Allegiance.

8404 Does this civil religion have a seminary?

8405 That question takes us back to Thomas Jefferson who, we
8406 should recall, conceived of legal education as a program for
8407 teaching "republican virtue," a program modeled on the university
8408 based training for ministers of religion.⁴⁴⁹ When Jefferson
8409 founded his "academical village" -- the University of Virginia --
8410 he developed a curriculum which first taught students in three
8411 broad areas: language, mathematics and philosophy.⁴⁵⁰ For those
8412 "who are destined for learned profession," Jefferson divided the
8413 education program into three departments and the grouping is
8414 interesting:

8415 ⁴⁴⁸ Id. at 10. Guy Wills' recent works have focused on
8416 Lincoln's contributions to moral theology, constitutional theory
8417 and rhetoric.

8418 ⁴⁴⁹ See Carrington, supra note __*, at 355.

8419 ⁴⁵⁰ Jefferson's letter to Edward Coles, August 25, 1814,
8420 printed in Adrienne Koch and William Peden, The Life and Selected
8421 Writings of Thomas Jefferson (Random House, 1944), p. 645.

8422 1st Department, the fine arts . . .

8423 2d Department, Architecture, Military and
8424 Naval; Projectiles, Rural Economy
8425 (comprehending Agriculture, Horticulture and
8426 Veterinary), Technical Philosophy, the
8427 Practice of Medicine . . .

8428 3d Department, Theology and Ecclesiastical
8429 History; Law, Municipal and Foreign.⁴⁵¹

8430 Jefferson saw enough similarity between law and theology to group
8431 them together and Professor Paul Carrington has written profusely
8432 on early American legal education making the point that the
8433 teaching of "public virtue" was the central purpose of early
8434 university-based law schools.⁴⁵²

8435 The idea I have been trying to develop is one which
8436 Oxford professor Roy Goode touched on when he attempted to assess
8437 the essential subjects which should be taught in European law
8438 schools now that the full integration of the European community is
8439 so close. His analysis of potential commercial law led him to

8440 ⁴⁵¹ Op cit., p. 646.

8441 ⁴⁵² See, Carrington, supra, notes _____ through _____ and
8442 _____.

8443 decide that none were "essential foundation courses," but he did
8444 come close to endorsing one course as such a fundamental course for
8445 all European law schools:⁴⁵³

8446 The subject to which I would turn, if I were
8447 obliged to prescribe a foundation course at
8448 all, is that which is the responsibility of
8449 another European organisation and another
8450 European court. I refer, of course, to
8451 fundamental human rights and the role of the
8452 European Commission and European Court of
8453 Human Rights. The provisions of the
8454 Convention and the rulings of the court in
8455 such matters as protection against degrading
8456 punishments, unlawful detention and prisoners'
8457 rights, have brought about changes in UK law
8458 and its administration on matters in which our
8459 own courts had found themselves powerless to
8460 intervene.

8461 The protection of fundamental human rights is
8462 ultimately what law and justice are about. It
8463 is the very essence of what we should be

8464 ⁴⁵³ Roy Goode, "Legal Studies: The European Law School,"
8465 (_____) Vol. 13, No. 1) March 1993, p. 14.

8466 inculcating in the minds of our students.
8467 What better introduction to the European ideal
8468 than to examine the way in which these rights,
8469 extending across the whole gamut of civil and
8470 criminal law and across the chasm which
8471 divides substantive law from procedure and the
8472 administration of justice, come under threat
8473 and are brought within the mantle of the
8474 protection of justice!

8475 My interest is not only in the fundamental subject
8476 selected by Professor Goode but in the way he talks about the
8477 teaching of that subject:⁴⁵⁴

8478 Legal analysis, however, is not enough. It
8479 is, of course, important that we train our
8480 students to develop their reasoning powers and
8481 intellectual skills; it is important that they
8482 be given some perception of the social and
8483 economic forces that drive the law; it is
8484 important that we help them to acquire the
8485 ability to view issues with objectivity and
8486 detachment.

8487 ⁴⁵⁴ Op. cit., pp. 14, 15.

8488 But if we have done no more than this, we have
8489 failed; if we insist too much on learning and
8490 not enough on feeling, we have failed; we have
8491 failed if we have so deadened our senses of
8492 our students with knowledge, so packed their
8493 heads with doctrine, so imbued in them the
8494 importance of objectivity, that they are no
8495 longer able to feel passionately about causes,
8496 that they become incapable of a sense of
8497 outrage when individuals suffer oppression,
8498 hardship or miscarriages of justice. Where
8499 there is oppression, where justice miscarries,
8500 it is not simply the fault of the government,
8501 the police, the courts or the legal system.
8502 It is the fault of us all, because we have
8503 stood back, we have looked at events from
8504 outside, we have not made it our business to
8505 be concerned. The protection and preservation
8506 of human rights are thus of the most
8507 fundamental importance. Surely, this, above
8508 all, is the legacy which each and every one of
8509 us, within and outside Europe, should bequeath
8510 to our students, the universal core of legal
8511 education.

8512 What is it about legal education today that supports the
8513 traditions of public virtue, of public service, of the justice
8514 mission, the idea of law as a calling? When is it in the course of
8515 our law school curriculum that we talk about each lawyer's
8516 "profession?" When do law students think about the oath and the
8517 meaning of that oath? Isn't it strange that all other times we
8518 have joined groups which claim a mission -- civic or religious --
8519 we spend some time learning about the belief system through study
8520 of the catechism, memorization of the oaths and creeds and pledges
8521 and through exposure to the history and tradition of the group.
8522 There is almost no attention given to this in law schools. Most
8523 new members of Rotary Clubs spend more time learning the "Four Way
8524 Test" than law students or new admittees spend learning about the
8525 oath of lawyers or the belief system of the profession.

8526 When do we decide that we have taught our students enough
8527 tough-minded analytical skills and begin to allow them to think
8528 about values and consequences? When do we spell out for our
8529 students the special duties of lawyers to society?

8530 The ABA Section on Legal Education and Admissions to the
8531 Bar report of June 1992 (the MacCrate Task Force report) helped
8532 advance the thinking of lawyers and legal educators by including
8533 "values" in the "Statement of Fundamental Lawyering Skills and
8534 Values" and the Task Force identified four areas of professional

8535 values:

- 8536 1. Provision of Competent Representation;
- 8537 2. Striving to Promote Justice, Fairness,
- 8538 and Morality;
- 8539 3. Striving to Improve the Profession;
- 8540 4. Professional Self-development.

8541 So much of the effort of legal education over the last
8542 century has been devoted to developing the hardened and
8543 dispassionate intellect. Indeed, law schools take pride that they
8544 are more rigorous than other graduate programs.⁴⁵⁵

8545 I would not abandon this feature of legal education but
8546 it should be maintained as a platform for adding something more.
8547 Some seminaries train ministers to understand their own religion in
8548 critical historical terms, and deal with the psychology of religion
8549 yet still inspire a sense of service and dedication. Law schools
8550 should need not abandon the role for which they were originally
8551 established by Jefferson -- the training of lawyers who will accept
8552 a very special role of citizenship.

8553 ⁴⁵⁵ I report this, but I do not believe it is always
8554 justified. After the first year, law school tends to be less and
8555 less rigorous and few third year students spend great effort on
8556 their courses. They may, I concede, spend time on co-curricular
8557 activities such as law review and moot court.

8558 I do not, I emphasize, suggest that we should abandon the
8559 rigors of law school training in analytic thinking. I would devote
8560 most of the first year of law school to that effort. Depending on
8561 the law school and its students, the second year program should
8562 place greater emphasis on skills, but I acknowledge that there may
8563 be legal doctrine which should be taught into the second year. The
8564 third year should bring students into contact with the real
8565 business of lawyering⁴⁵⁶ and the development of ideals of public
8566 service.

8567 In this proposal, I want to again invoke the memory of
8568 Thomas Jefferson. The idea of the law as a secular religion --
8569 with "the Constitution as the focus of a faith community"⁴⁵⁷ -- in
8570 Professor Sanford Levinson's words, is very much alive but my
8571 question is how will it be kept alive? How is this faith passed
8572 down to future generations?

8573 It is curious that Thomas Jefferson, a skeptic in so many
8574 things (including reverence for the constitution, the core document

8575 ⁴⁵⁶ Alternatively, law students should be allowed to pursue
8576 graduate work in other academic disciplines (history, philosophy,
8577 business, political science, economics) which relate to their areas
8578 of principal interest.

8579 ⁴⁵⁷ Levinson, supra, note __*, at 180.

8580 of American civil religion⁴⁵⁸), had a vision for legal education
8581 when he followed the lead of the churches with their seminaries and
8582 sought to establish university-based education to train lawyers.
8583 These lawyers, Professor Carrington tells us, were to learn the
8584 craft of republican government and were to serve the law in the
8585 manner that the university-trained ministers were to serve the
8586 religious faiths.⁴⁵⁹ Jefferson allowed his mind to look
8587 skeptically at institutions but sensed the importance of a
8588 university-based education for training lawyers in their civic
8589 responsibility. This Jeffersonian model is one which we should
8590 consider for our times.

8591 Professor Carrington reminds us that Wythe's principal
8592 interest was elsewhere:⁴⁶⁰

8593 George Wythe and his followers were
8594 consciously engaged in moral education: they
8595 sought to prepare young men (and at Oberlin,
8596 perhaps a woman or two) for public life in a
8597 democracy. They taught law as an act of

8598 ⁴⁵⁸ Jefferson once wrote: "some men look at constitutions
8599 with sanctimonious reverence and deem them like the ark of the
8600 covenant, too sacred to be touched." Leicester Ford, 10 Writings
8601 of Thomas Jefferson, 42 (1899).

8602 ⁴⁵⁹ Carrington, supra note __*, at 341.

8603 ⁴⁶⁰ Carrington, supra, note ____, p. 340.

8604 patriotism.

8605 We should think first about the law professor. George
8606 Wythe, Jefferson's mentor and the first law professor for an
8607 American university-based law school, was a person of extraordinary
8608 talent, experience, skill, and integrity.⁴⁶¹ His career was a
8609 model for law students and he undoubtedly taught them a great deal
8610 of law. We cannot today recreate the law school of George Wythe,
8611 but we can pick up on the idea by involving great lawyers in the
8612 program of the law school. There are many possible models.

8613 One possibility is the recruitment of senior or retired
8614 lawyers who are willing to devote themselves to teaching or team
8615 teaching, and who will not require large incomes. As a Florida law
8616 school dean, I recruited such a lawyer from Oregon for one semester
8617 and he contributed greatly to the program and was a better
8618 counselor for students than other, less experienced,
8619 professors.⁴⁶² Perhaps these lawyers could be recruited and
8620 screened and certified so that the program does not dissolve into
8621 a patronage exercise with heavy contributors getting the
8622 invitations.

8623 ⁴⁶¹ Carrington, supra, note ____*, at 533-38 (discussing the
8624 virtues of Wythe).

8625 ⁴⁶² To those familiar with legal education, his name was
8626 Richard Nashtoll, a great force in legal education.

8627 Law schools could draw on the talents of highly competent
8628 lawyers if they would make the effort and lawyers can be recruited
8629 if we understand their motivations. We should not underestimate
8630 the egos of senior lawyers. They believe that they have something
8631 to contribute to the next generation. They do and much of what
8632 they can contribute relates to the passion for justice, the sense
8633 of public service, a faith in the system.

8634 A second model is to use practicing lawyers more in the
8635 third year and to abandon the bias against adjuncts at least at
8636 that phase of law schools. If we will look seriously at a third
8637 year of law school with the purpose of orienting students to their
8638 chosen profession, providing counseling to them, and acquainting
8639 them with their duties to society, experienced lawyers are the most
8640 creditable teachers. Most lawyers will be willing to serve without
8641 substantial payment or for the small benefit of getting continuing
8642 legal education credit. Properly employed as counselors for third
8643 year students, as resources for clinical programs, and as team
8644 teachers in courses designed to look at the broad reach of the law,
8645 these lawyers could add a great deal to the study of law.

8646 To set the predicate for these proposals, I have already
8647 argued that we should begin to divide the law school experience
8648 into a period devoted to basic law school courses and the
8649 development of analytical skills. The dividing point can be drawn

8650 by offering the bar exam at the end of that period for those
8651 students who wish to take it then or, alternatively, structuring an
8652 intensive clinical or role-playing course of study which will earn
8653 the student a waiver of the bar exam.

8654 To develop this model, let me assume that a law school
8655 looks at its program and decides that it should spend the first two
8656 years teaching basic courses and that the bar examiners then allow
8657 the exam to be taken at this juncture. This serves to separate the
8658 first years from the third and we can give more attention to what
8659 we are doing with the third year. In Chapter 11, I indicated some
8660 of the things I would have the law school do to improve the way we
8661 teach law. To these items, I would add a special dimension for the
8662 third year through several steps.

8663 To me, the fundamental idea of our profession is that we
8664 are specially responsible for the justice system and for the
8665 provision of access to justice.

8666 I endorse the idea that the third year in law school
8667 provide some exposure to that system through a public service
8668 requirement for law students which connects lawyers with the
8669 delivery of legal services to the poor and that the bar exam be
8670 reformed. One goal of the exam (or certification by the law
8671 schools) should be to insure that law graduates understand their

8672 oaths and are prepared to serve the "defenseless and oppressed."
8673 If we review the experience of most law students, particularly
8674 those who are at the top of their class -- those who have been
8675 "sorted" to go to the large corporate firms, we see that many never
8676 have any contact with the justice system for which society makes
8677 lawyers specially responsible. The value of clinical legal
8678 education is great but it is particularly important to expose
8679 lawyers to the realities of our system of justice.

8680 This can be done, in part, by an expansion of clinical
8681 programs and through the development of new programs. The best of
8682 these programs involve students with exposure to live clients and
8683 real problems and also gives them some opportunity to reflect on
8684 the system. A very important component of this program should be
8685 in the area of values and, using the list of values formulated by
8686 the MacCrate Task Force,⁴⁶³ law faculties should seriously think
8687 about ways that they can help law students think about the
8688 importance of competent representation, professional self-
8689 development and the duties to improve the profession and promote
8690 justice. The profession is not organized to teach those values
8691 after law school and, in any event, there is every reason for law
8692 schools to begin the exposure of students to these fundamental
8693 notions.

8694 ⁴⁶³ ABA Section of Legal Education and Admission to the Bar
8695 1992, pp. 10, 11.

8696 One of the most important things that legal education can
8697 do for the profession and for the justice system is to develop the
8698 scholarly framework for the renewal of the profession's interest in
8699 public service.

8700 The law school movement which has drawn the most attention
8701 in recent years -- the Critical Legal Studies movement -- has been
8702 detached from the profession and quite contemptuous of the
8703 practicing lawyer. The critical legal studies movement is largely
8704 rooted in theories of class struggle and though it has been
8705 successful in "trashing" traditional legal doctrine as political
8706 mechanisms for maintaining the power of elites, it conjures up the
8707 jibe of the barber shop philosopher who pronounces his verdict on
8708 some strange idea: "That dog don't hunt." The Crits' ideas don't
8709 hunt, but at least they have advanced ideas and there is, at the
8710 core of these ideas, some sense that we can do better. There is
8711 not a coherent agenda for change, and since most of the law
8712 professors who profess to be "crits" have such apparent disdain for
8713 the practicing lawyer, there is not much prospect that the movement
8714 will provide direction to the profession.

8715 The fundamental problem with the "Crits" is that, while
8716 they built on the ideas advanced by Legal Realists, they ignore
8717 Justice Holmes' great aphorism: The life of the law has been
8718 experience, not logic. The modern legal theories which are built

8719 on logic are exciting intellectually, but they are not rooted in
8720 the experience of common lawyers.

8721 Hopefully, legal scholars who understand the experience
8722 of the profession and of clients will help point the way for the
8723 legal profession and for those systems such as legal education and
8724 bar admission, which support the profession. That course ought to
8725 lead to a reconnection of the profession with its traditions of
8726 public service.

8727 Thomas Jefferson would approve.

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Chapter Fifteen

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CONNECTIONS

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I have written about connections -- about connecting lawyers with their communities and connecting legal education with the profession. De Tocqueville's often quoted comments about American law and lawyers still are accurate. Political problems still tend to become legal problems and law is the civil religion of this country. But other observations by de Tocqueville are not so accurate today. Robert Bellah and his colleagues used a de Tocqueville phrase -- "habits of the heart" -- as the title of their book of case studies examining individualism and commitment in modern American life.⁴⁶⁴

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In recent years, a new scholarly movement has grown up around the idea of community and the responsibilities of the citizen.⁴⁶⁵ Professor Mary Ann Glendon⁴⁶⁶ and others have

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⁴⁶⁴ Robert Bellah, et al., Habits of the Heart: Individualism and Commitment in American Life, (Berkeley: University of California Press, 1985).

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⁴⁶⁵ This movement now has its own journal, The Responsive Community.

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⁴⁶⁶ Mary Ann Glendon, Rights Talk (New York: The Free Press, MacMillan, 1991).

8750 criticized the tendency of Americans to cast all political dialogue
8751 in absolute terms of rights, ignoring all duties. These scholars
8752 point to the ideal of the community where citizens have both rights
8753 and responsibilities. There are also strong traces of
8754 communitarian idealism in the political rhetoric of the 1992
8755 campaign. Bill Clinton's Democratic convention speech calling for
8756 a "new covenant," his inaugural address summoning Americans to a
8757 "season of service" and his first address to Congress calling for
8758 a shared burden all draw on the communitarian ideal.

8759 This idea of the community, of citizens' responsibility
8760 to society is an important theme for lawyers who may still hold
8761 claim to be the "aristocrats" of this country, at least in the
8762 sense that de Tocqueville used this word. Lawyers (and judges)
8763 still have a special place in American life, but de Tocqueville's
8764 description of lawyers as "the connecting link between the two
8765 great classes of society"⁴⁶⁷ is not a description which rings true
8766 today.

8767 As lawyers have increased the standards for their
8768 profession and gained in wealth and prestige, still retaining their
8769 place of prominence in public life and the grip on one of the three

8770 ⁴⁶⁷ Alexis de Tocqueville, Democracy in America 276. (New
8771 York: Vintage Books, 1990).

8772 branches of government, they have become separated from their
8773 communities. Lawyers have increasingly organized themselves into
8774 vast law firms removed from the main streets of American and out of
8775 touch with its ordinary citizens. Poor people and the working poor
8776 can not afford lawyers and do not have any reason to feel that the
8777 justice system belongs to them. Access to justice is a part of the
8778 American ideal -- I believe it is an essential part -- but in
8779 reality, many Americans do not have access to justice.

8780 The role of the American lawyer as the "connecting link"
8781 can be fulfilled by establishment of a comprehensive pro bono
8782 system which calls all lawyers to serve and holds them accountable
8783 for fulfilling their oaths. Judges, acting in the common law
8784 tradition, should issue this call to service and publicly call on
8785 lawyers. Reconnecting lawyers to the tradition of service and
8786 reconnecting them with their communities will help bridge the gap
8787 in access to justice and will provide the legal profession the
8788 moral platform to call for other public measures to achieve full
8789 access to justice.

8790 This idea of reconnecting lawyers to their communities is
8791 important to the legal profession and to individual lawyers on
8792 other grounds as well. The profession's claim on the "franchise"
8793 of practicing law can not be maintained if lawyers do not find ways

8794 to provide access to justice for the larger public and this quest
8795 for a reconnection becomes important for the public confidence in
8796 the profession.

8797 Equally important is the individual lawyer's sense of
8798 fulfillment and self-respect. The broad dissatisfaction among
8799 lawyers has many causes, but one principal cause, in my opinion, is
8800 the sense that lawyers have of the worth of their daily work. I
8801 believe most lawyers want to feel pride in their profession which
8802 will come from the effort to fulfill the legal profession's
8803 obligation to society.

8804 Lawyers' disconnection from society is paralleled by the
8805 disconnection between law schools and the practicing bar and my
8806 second theme is that law schools should be connected with the
8807 profession. Law schools today do a better job than ever before in
8808 recruiting bright students and training them to analyze appellate
8809 cases and to think critically, but this task has been largely
8810 completed by the end of the first or, at most, the second year of
8811 law school. The mission of law school should be to help recruit
8812 and train lawyers who believe in the professional ideals (including
8813 public service) and begin to teach the skills they will need in
8814 their careers. Law schools do not do enough of this and the bar
8815 examiners should consider strategies to encourage law schools to do

8816 more.

8817 Offering the bar exam at the end of the first or second
8818 year of law school would help draw a line between the teaching of
8819 doctrine (and analysis) and, hopefully, encourage law schools to
8820 move on to other areas, teaching the skills and values of the
8821 profession, teaching students to learn from experience. If bar
8822 examiners (and the courts which supervise them) take their role to
8823 protect the public seriously, they will see that law schools will
8824 be more accountable when the bar exam is given at an earlier time
8825 or even waived where law schools provide exceptional skills and
8826 value training. This strategy will better connect the law schools
8827 with the profession, particularly if the profession steps forward
8828 to help law schools gain the additional resources they will need to
8829 teach skills and values. Perhaps those resources will come from
8830 the demands of the profession that universities stop teaching law
8831 "on the cheap" in large class format. Perhaps it will come, in
8832 part, from a reconnection of the profession with the teaching
8833 function. Law schools might learn to accept experienced practicing
8834 lawyers and judges to help with the teaching of skills and values.

8835 Throughout my legal career, I identified with Holmes and
8836 Pound and Frank and the great Legal Realists, but my concerns are
8837 now different from theirs. In some respects, I see the need to

8838 develop the law in a direction entirely different from the
8839 direction in which they pointed us. The Legal Realists who shaped
8840 my generation pointed us in the right direction urging us to
8841 discard empty ceremony and sterile legal doctrine, but today the
8842 legal profession does not have much sense of direction. Scholars
8843 today stand too distant from the legal profession and the movement
8844 within bar associations to regain professionalism has had only
8845 modest success.

8846 Today, the great need of the legal profession is to
8847 recapture the sense of law as the civil religion -- and for
8848 individual lawyers to reclaim the sense of "calling."

8849 I would reconnect the profession with its heroes and some
8850 of its myths, with its oaths and its traditions. Lawyers can
8851 fulfill their historic role and redeem the rhetoric of public
8852 service. I see lawyers as a very special profession, a profession
8853 connected to the community, connected to its own ideals. Lawyers
8854 should again be the "connecting link" of America.